In The

# Supreme Court of the United States

Docket No. 78-1595

GEORGE CALVIN LEWIS, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

ANDREW W. WOOD
J. HATCHER JOHNSON
300 West Main St.
Richmond, Virginia 23220

*Counsel for Petitioner*

## TABLE OF CONTENTS



## TABLE OF CITATIONS

### Cases

**Other Authorities**

*Page*



**In The**

# Supreme Court of the United States

---

**Docket No. .....**

---

GEORGE CALVIN LEWIS, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI

---

This is the petition of George Calvin Lewis, Jr., for a Writ of Certiorari to a judgment of the United States Court of Appeals for the Fourth Circuit.

### OPINION BELOW

The Court's opinion has not yet been published in the Federal Reporter, Second Series. It will, however, be reported. The case number in the Court below is No. 78-5073.

### JURISDICTION

The jurisdiction of this Court is invoked by reason of the following:

(A) The case was decided on January 24, 1979; and judgment was entered that date.

(B) A petition for rehearing and motion for stay of mandate were timely filed. On March 19, 1979, the petition for rehearing was denied, and the Court stayed the issuance of mandate for 30 days from March 19, 1979, to permit filing of a petition for writ of certiorari.

(C) Jurisdiction to review the decision of the Court of Appeals is conferred by 28 U.S.C. § 1254.

## QUESTION

The question presented is whether a conviction in violation of *Gideon* v. *Wainwright,* 372 U.S. 335, may be used to support a subsequent conviction under Title 18 U.S.C. App. § 1202(a)(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, treaties, statutes, ordinances, or regulations involved are:

(A) The Constitution of the United States of America, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(B) Title 18 U.S.C. App. § 1202(a)(1): "Any person who—(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony



* * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000, or imprisoned for not more than two years, or both."

## STATEMENT OF THE CASE

George C. Lewis was tried in the United States District Court for the Eastern District of Virginia on December 22, 1977. He was charged with possessing a firearm having been previously convicted of a felony.

On the day of the non-jury trial, counsel for Lewis, in a request for a continuance, brought to the District Court's attention that the underlying conviction was a 1961 conviction of breaking and entering with intent to commit a misdemeanor, which was a felony under Florida law. Counsel represented to the Court that he had discovered a few days earlier that Lewis had not had an attorney at this 1961 trial. Counsel stated that at his request an attorney in Florida had investigated the records of the Court where Lewis was tried. These records, counsel told the District Court, showed affirmatively that Lewis did not have a lawyer. Counsel also made a proffer of evidence of indigency.

The District Court ruled that the invalidity of the conviction was immaterial. Accordingly, no proof of the Gideon violation was presented. The Appellate Court affirmed, with one judge dissenting.

## ARGUMENT

There is a division among the circuits on whether convictions that are constitutionally invalid may underlie convictions under Title 18 U.S.C. App. § 1202(a)(1) and related statutes.

For example, the Ninth Circuit (*Pasterchik* v. *United States,* 466 F.2d 1367) and the Seventh Circuit (*United*

*States* v. *Lufman,* 457 F.2d 165) have held collateral attack permissible.

But a sharply divided Third Circuit (*United States* v. *Graves,* 554 F.2d 65), the Tenth Circuit (*Barker* v. *United States,* 579 F.2d 1219), the Eighth Circuit (*United States* v. *Edwards,* 568 F.2d 68), and the Fourth Circuit (the instant case and *United States* v. *Allen,* 556 F.2d 724) have held otherwise.

Additionally, the Sixth Circuit has decided a case, *United States* v. *Maggard,* 573 F.2d 926, which held that a conviction attacked collaterally for *ineffective* assistance of counsel could form the basis for a firearms conviction, but said in dictum that it did not believe the same result would hold in a case in which proof of the conviction showed facial invalidity.

Lastly, the Fifth Circuit has held that in prosecutions under 18 U.S.C. § 922(a)(6), that is, falsification of one's status, the underlying conviction may not be attacked. *United States* v. *Ransom,* 545 F.2d 481, cert. den. 434 U.S. 909, Mr. Justice White dissenting. But the Fifth Circuit has reached a different result in possession cases. *Dameron* v. *United States,* 488 F.2d 724.

Lewis alleged in the District Court that his underlying conviction (which, incidentally, came out of the same state, Florida, and about the same time, as Gideon's) was a pure violation of *Gideon* v. *Wainwright,* 372 U.S. 335. He alleged he was unrepresented. His attorney represented that production of the court records would show this fact. He also made a proffer of indigency. It should be pointed out that the government's proof of the prior conviction consisted of Lewis's Florida prison record, not his court records.

We believe the position taken by the Court of Appeals for the Fourth Circuit is unique. No other circuit has held that convictions based on violations of *Gideon* can form the basis



for convictions under the firearms statutes. See Judge Winter's dissent at page 21 of the appended decision. We respectfully submit this holding marks a retreat from *Gideon,* and from *Burgett* v. *Texas,* 389 U.S. 109, *United States* v. *Tucker,* 404 U.S. 443, and *Loper* v. *Beto,* 405 U.S. 473.

## CONCLUSION

We respectfully request that the Writ of Certiorari be granted.

/s/ ANDREW W. WOOD
*Counsel for George Calvin Lewis, Jr.*

ANDREW W. WOOD
J. HATCHER JOHNSON
White & Wood, P. C.
300 West Main St.
Richmond, Virginia 23220

## CERTIFICATE

I certify that three copies of this Petition with the opinion appended, were mailed to N. George Metcalf, Assistant United States Attorney, U.S. Court House, 10th and Main Sts., Richmond, Va. 23219, and the same number of copies to Solicitor General, Department of Justice, Washington, D. C. 20530, prior to filing in the Clerk's Office of this Court.

ANDREW W. WOOD

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 78-5073

---

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE CALVIN LEWIS, JR.,
Appellant.

---

Argued: October 6, 1978 Decided: January 24, 1979

---

RUSSELL, CIRCUIT JUDGE:

This appeal presents for decision whether a defendant, charged as a convicted felon with the possession of a firearm in violation of § 1202(a)(1), 18 U.S.C. App., may defend by claiming for the first time that his felony conviction was constitutionally invalid. The facts giving rise to this question in this case are not in dispute. The defendant does not deny on this appeal the receipt and possession of a firearm. Neither does he dispute his earlier conviction in Florida or that such conviction is facially valid. It is further conceded that prior to his receipt and possession of the firearm and prior to his trial in this case, he had not collaterally attacked in any post-conviction proceeding this extant conviction. He does claim as his sole defense, though, that his felony conviction was invalid because he was denied the assistance

of counsel, and he sought to offer evidence in support of such claim. The district court refused to admit any such evidence and held that, in a prosecution under § 1202(a)(1), the defendant may not defend by seeking at trial to impeach on constitutional grounds his earlier felony conviction. After conviction, he appealed, contending that this ruling, denying him the right to attack collaterally his earlier felony conviction in his § 1202(a)(1) prosecution was in error. We perceive no error in the ruling and affirm the conviction.

The Gun Control Act, an integral part of the Omnibus Crime Control and Safe Streets Act of 1968,[1] was intended to bar certain classes of persons from possessing or receiving firearms and to limit possession of firearms to "persons who are responsible and law-abiding."[2] The right of Congress, in the interest of public safety, to enact such legislation and to establish the classifications of persons who might not possess firearms has never been questioned. *United States* v. *Samson* (1st Cir. 1976) 533 F.2d 721, 722, *cert. denied* 429 U.S. 845. Congress has identified in that Act as a class not permitted to possess or receive firearms "[a]ny person who—(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony." § 1202(a)(1). What Congress intended by this section, as the legislative history as well as the statutory language itself

[1] The Omnibus Crime Control and Safe Streets Act of 1968 consists of two Titles relating to the possession of firearms. § 922 is a part of Title IV and § 1202 is a part of Title VII. Title IV was the original firearm section but Title VII was added during Senate consideration of the Act and was intended, according to its author, to complement Title IV. There is of course considerable overlap of the two Titles but each was seeking to deal with the same evil under similar prohibitory procedures. For a discussion of the legislative history of the two Titles, *see United States* v. *Bass* (1971) 404 U.S. 336, 341-346 and *Hyland* v. *Fukuda* (9th Cir. 1978) 580 F.2d 977, 979, note 3.

[2] *Barker* v. *United States* (10th Cir. 1978) 579 F.2d 1219, 1226.



makes clear, is that any person within this status class of a convicted felon, whose conviction was not facially invalid and whose conviction had "not been invalidated as of the time the firearm is possessed," is subject to the statutory prohibition stated in § 1202(a)(1), and this is true though his "status as a convicted felon changed after the date of possession, *Regardless of how that change of status occurred.*" (Italics added) This was the construction given the statute by Judge Hufstedler in the earliest case to consider the application of 1202(a)(1). *United States* v. *Liles* (9th Cir. 1970) 432 F.2d 18, 20.[3]

In *Liles,* the defendant's conviction under 1202(a)(1) was affirmed "notwithstanding the fact that the prior conviction, which was an essential element of the firearms conviction, was reversed one day before he was convicted of the firearms offense. It was there held that Liles' possession of the revolver was unlawful for *one of his* status at the time he possessed it. It was not made lawful by the subsequent reversal of his prior felony conviction."[4] The rule in *Liles*

[3] In *McHenry* v. *People of State of California* (9th Cir. 1971) 447 F.2d 470 at 471-472, an entirely different panel of this Circuit sought, over a strong dissent to restrict *Liles* to the situation where "the prior felony conviction was reversed because of insufficient evidence" and not where it was reversed for some constitutional defect. 447 F.2d at 471. For reasons later stated herein, it appears to us that one whose conviction is invalidated for want of evidence stands in a stronger position than one whose conviction is reversed and remanded for another trial because of a constitutional defect. We agree with the comment of the dissenting judge in *McHenry,* who wrote (477 F.2d at 472):

> "After oral argument, we invited supplemental briefs and a discussion of *Liles*. The parties have been unable to distinguish it from the case before us, nor can I."

[4] (Italics in opinion) This summarization of the ruling in *Liles* is taken from *Barker, supra* (579 F.2d at 1226).

*Liles* was followed in *United States* v. *Williams* (8th Cir. 1973) 484 F.2d 428, 430, even though the conviction in that case had been dismissed.

would seem to be applicable, whatever the basis on which the felony conviction may subsequently have been reversed or invalidated. This would include subsequent invalidation for constitutional error in the conviction.

We apprehend no legal difference between a subsequent reversal for a denial of a constitutional right and one based on some other error; both are equally invalid. It must be conceded, however, that the equities are more in favor of the defendant whose felony conviction is subsequently reversed on appeal for insufficiency of evidence than one whose conviction is reversed for failure to afford counsel to the defendant.[5] In the former case, the defendant is acquitted and found never to have been guilty; in the latter, the conviction is merely reversed and the defendant is subject to retrial and possible conviction anew. Unquestionably, the defendant in the latter case, who has not been found guilty, should have no greater right than the defendant in the former case, who was adjudged not guilty. That is, though, precisely the position of the appellant.

This position of the appellant is contrary to the manifest legislative purpose of § 1202(a)(1) and related legislation, as we declared it in *United States* v. *Allen* (4th Cir. 1977) 556 F.2d 720. In that case, we said that by its firearms legislation "Congress intended to restrict the disposition of firearms to those with *standing* felony convictions *even though the convictions may later be found constitutionally invalid.*"[6] This construction of the legislation as stated in *Allen* was also expressed by the Court in *United States* v. *Graves* (3d Cir. 1977) 554 F.2d 65, 69, a case cited with approval in *Allen*. In that case, the Court said:

[5] *See, United States* v. *Williams, supra* (484 F.2d at 430).

[6] (Italics added.) 556 F.2d at 722.



> "These materials (*i.e.*, '(a) the language of the statutes, (b) the legislative history, and (c) the opinions of other courts which have endeavored to interpret the statutes') suggest that the legislative draftsmen desired persons with extant, though arguably unconstitutional, convictions to forbear from the purchase and possession of firearms until their convictions are voided by the courts or until they are freed from such disability by executive action. Failure to so refrain was intended to subject such persons to the penalties specified in the Act."

Assuredly Congress never intended that prosecutions under this legislation should be encumbered with collateral issues attacking the validity of a facially valid conviction, either because, as in *Williams,* the conviction had subsequently been reversed on account of insufficiency of evidence, or, as here, because of a constitutional claim of denial of counsel. So much we declared in *Allen,* where we said that "[t]he scheme [of prosecution under the legislation] adopted by Congress avoids the time-consuming collateral issues."[7] This view as set forth in *Allen* was recently upheld in *United States* v. *Maggard* (6th Cir. 1978) 573 F.2d 926. In that case, the Court said that "the legislative history of § 1202 indicates that Congress intended to make the proof of the fact of a prior felony conviction the sole predicate for the prohibition against possession of a weapon" and neither "Congress [nor] the Supreme Court has required or suggested that a court to which a § 1202 indictment is assigned

[7] 556 F.2d at 723.

*Allen,* it is true, involved a false statement prosecution under § 922(a)(6) and not a status prosecution such as here but the quoted reasoning is equally applicable to either type of prosecution and has been generally so construed. *See, United States* v. *Bryant* (D. S.C. 1978) 448 F. Supp. 139, 144.

for trial must routinely retry the constitutional validity of the predicate offense."[8]

The appellant argues that, irrespective of legislative purpose, a conviction under § 1202(a)(1), which includes as an essential element a felony conviction, cannot stand if it can be shown in the 1202 prosecution that the defendant's constitutional right to counsel was denied at his felony conviction. This, he asserts, is the command of *Burgett* v. *Texas* (1967) 389 U.S. 109, which, in his view, makes the felony conviction "void from the outset" and not usable "for any purpose." This argument, if sustained, would mean that the Government, at any time a defendant chooses to raise the issue, would be obligated to prove in a firearms prosecution that the underlying felony conviction was free of constitutional error. *Allen* refused to read *Burgett* "so broadly" or to find, as the defendant would argue, "that a conviction in violation of *Gideon* is absolutely meaningless" in this context.[9] We declared there that Congress had a right to prohibit a person subject to an extant felony conviction, "even though * * * obtained in violation of *Gideon*," from possessing a firearm. We said:

> "Although *Burgett, Tucker* and *Loper* established that a conviction in violation of the right to counsel is too unreliable to show guilt or enhance punishment under a recidivist statute, to form the basis for an increased sentence, or to be used to impeach general credibility, they do not say that a conviction in violation of *Gideon* is absolutely meaningless. The reliability of an indictment as an indication of probable cause to believe that a certain person has committed a crime does not depend on the presence of defense counsel for

[8] 573 F.2d at 928 and 929.
[9] 556 F.2d at 723.



> those under investigation. * * * (citing cases) Nor does the absence of defense counsel or the lack of a waiver of the assistance of counsel render a prior felony conviction invalid or unreliable as an indication that the public interest requires that the convicted person's access to firearms be restricted when the conviction has not been reversed or vacated and the defendant remains unpardoned. We think that Congress is entitled to rely on a prior standing conviction as proof that there is probable cause to believe the convicted person has been involved in criminal activity and should not be able to buy a gun without first showing that he is no threat to public safety, even though the conviction may have been obtained in violation of *Gideon*."

*Graves* sounded the same warning and reached the same conclusion (554 F.2d at 83):

> "As a final point, we recognize that to extend *Burgett* to prosecutions under the Gun Control Act might well create a new method of collateral attack, *i.e.*, a re-evaluation of the constitutionality of prior criminal proceedings within a trial of a weapons offense. To obtain a firearms conviction, under the approach pressed by Graves, the government would have to demonstrate the constitutional validity of outstanding convictions—at whenever a defendant so insists. Yet, there is no evidence that Congress intended this type of procedure—a 'trial-within-a-trial'—when it enacted the firearms legislation. Nor is there anything in *Burgett* or its descendants to indicate that the Supreme Court commanded such an arrangement. Consequently, this Court should not sanction a program which appears to be at variance with the intent of Congress and goes a substantial step beyond the teachings of *Burgett*."

We recognize that there are cases which take a contrary view to that expressed by us.[9] We do not find them persuasive nor do they answer the thoughtful opinion of Chief Judge Haynsworth in *Allen*, and the substantial number of cases which have taken a like view with him.[10] We accordingly conclude that Congress had the constitutional power, in the promotion of public safety to prohibit under criminal penalties any person subject to an outstanding facially valid felony conviction, which, though arguably constitutionally invalid, had not been earlier invalidated, from possessing and receiving firearms and that it did so by § 1202(a)(1).

The conviction of the defendant is accordingly

**AFFIRMED.**

[9] *United States* v. *Pricepaul* (9th Cir. 1976) 540 F.2d 417, 424, *Dameron* v. *United States* (5th Cir. 1974) 488 F.2d 724, 727, *United States* v. *Lufman* (7th Cir. 1972) 457 F.2d 165, 167, *United States* v. *DuShane* (2d Cir. 1970) 435 F.2d 187, 190, and *United States* v. *Mason* (D. Md. 1975) 68 F.R.D. 619, 625.

[10] *Barker* v. *United States* (10th Cir. 1978) 579 F.2d 1219, 1226, *United States* v. *Maggard*, (6th Cir. 1978) 573 F.2d 926, 928-929, *United States* v. *Graves* (3d Cir. 1977) 554 F.2d 65, 80-81, and *United States* v. *Bryant* (D. S.C. 1978) 448 F. Supp. 139, 141.

The Eighth Circuit has reserved judgment on status type cases. *United States* v. *Edwards* (8th Cir. 1977) 568 F.2d 68, 72.



WINTER, CIRCUIT JUDGE, dissenting:

The majority decides that one prosecuted for an alleged violation of 18 U.S.C. App. § 1202(a)(1)[1] cannot defend on the ground that the prior conviction for a felony rendering his receipt or possession of a firearm a violation of law was obtained in violation of the Sixth Amendment. Because I believe that § 1202(a) does not place on the defendant the burden of affirmatively seeking to vacate a conviction manifestly invalid because of the denial of counsel, I respectfully dissent.

## I.

As this case comes to us, I do not understand, as the majority asserts, that defendant concedes the "facial" validity of his earlier conviction. He asserts that the record of that conviction shows that he was unrepresented by counsel and that the conviction is void on its face. The district court declined to consider the record of the prior conviction, ruling it immaterial. In arguing the correctness of the district court's ruling, the government in effect concedes that for present purposes the conviction was obtained in violation of defendant's Sixth Amendment rights. For purposes of this appeal, we must treat that as a fact.

The majority's interpretation of § 1202(a) rests on the premise that Congress meant to punish the possession of a firearm by a person who has been convicted of a felony, even if that conviction was obtained in total disregard of his constitutional right to the assistance of counsel. I am reluctant to attribute to Congress such a cavalier attitude

[1] § 1202(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined . . . or imprisoned . . . .

toward one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).[2] Moreover, I find insubstantial support for the conclusion.

Section 1202 was introduced as a last-minute amendment on the floor of the Senate. It is therefore doubtful that Congress gave full consideration either way to the matter of the constitutional validity of the prior felony conviction.[3] Even the opinion in United States v. Graves, 554 F.2d 65 (3 Cir. 1977), upon which the majority heavily relies, admits that "the applicable legislative record is somewhat limited in scope and does not speak directly to the precise issues raised in this case," and that the legislative intent must be gleaned from "some clues" in the statutory history. *Id.* at 73.[4]

In any event, it is axiomatic that a statute should be read, if possible, to avoid a construction that would render it unconstitutional.[5] *See, e.g.,* United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Vuitch, 402 U.S. 62, 70 (1971). In my view, the majority's construction of § 1202 (a) runs afoul of that rule.

[2] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." United States v. Graves, 554 F.2d 65, 82 n.68 (3 Cir. 1977) (quoting Schaefer, *Federalism and State Criminal Trials,* 70 Harv. L. Rev. 1, 8 1956)).

[3] "Title VII [which includes § 1202] was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report." United States v. Bass, 404 U.S. 336, 344 (1971). The amendment, introduced by Senator Long, received a favorable but cautious reaction on the Senate floor, but suggestions for further study and modification were preempted by an unexpected call for a vote. Title VII received similarly scant attention in the House. *See id.* at 344 n.11.

[4] The majority also seeks support for its statutory interpretation in United States v. Allen, 556 F.2d 720 (4th Cir. 1977), but that case dealt not with § 1202(a) but with 18 U.S.C. § 922, which prohibits the giving of a false statement in connection with the purchase of a firearm. Unlike § 922, § 1202(a) requires a *conviction* for a felony, not merely an indictment or a statement about prior criminal activity. Thus, the reasoning in *Allen* that mere probable cause to believe that a person has committed a felony, rather than a reliable conviction, is enough to restrict his ability to possess a firearm and to support a conviction is inapplicable to § 1202(a). While § 922 is a part of Title IV of the Ominbus Crime Control and Safe Streets Act, § 1202(a) is part of Title VII of that Act. In another context, the Supreme Court has cautioned us that these titles must not be assumed to "dovetail neatly." United States v. Bass, 404 U.S. 336, 344 (1971). *See also* United States v. Graves, 554 F.2d 65, 87 (3 Cir. 1977) (Garth, J., concurring in part and dissenting in part). Moreover, as I discuss below, the exact holding of *Allen* was that § 922(a)(6) penalized making false statements rather than being a felon. Broader and more general language in *Allen* is thus dictum.

[5] The opinion in United States v. Liles, 432 F.2d 18 (9 Cir. 1970), on which the majority heavily relies to support its statutory interpretation, gives no indication that it ever considered the implications of Burgett v. Texas, 389 U.S. 109 (1967). This omission is not surprising, since the prior conviction in *Liles* was asserted to be invalid on grounds of substantive state law, not considered in *Burgett*. Nor is it surprising that on four separate occasions, the Ninth Circuit, when faced with the problem of *Burgett,* has ruled that the constitutional invalidity of a prior felony conviction may be asserted as a defense to a charge of possession or transportation of a firearm by a felon. United States v. Pricepaul, 540 F.2d 417 (9th Cir. 1976); Pasterchik v. United States, 466 F.2d 1367 (9th Cir. 1972) (per curiam); McHenry v. California, 447 F.2d 470 (9th Cir. 1971); United States v. Thoresen, 428 F.2d 654 (9 Cir. 1970).



## II.

I had thought that, as a matter of constitutional law, Burgett v. Texas, 389 U.S. 109 (1967), prohibited the very thing that was done here. *Burgett* held that the record of a prior conviction which showed on its face that the conviction was obtained in violation of the right to counsel was inadmissible in a prosecution under a Texas recidivist statute. "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* [372 U.S. 335 (1963)] to be used against a

person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Id.* at 115.[6] Here, defendant's receipt and possession of a firearm was illegal solely because he had been previously convicted of a felony. A necessary element of the crime was proof that he had been convicted of a felony and the government's only proof was that of a conviction which had been obtained without counsel. The conclusion is inescapable that the prior offense supported the determination of guilt for the instant offense in violation of *Burgett*.

Our decision in United States v. Allen, 556 F.2d 720 (4 Cir. 1977), does not lead to a contrary conclusion. *Allen* concerned a prosecution under 18 U.S.C. § 922(a)(6) which prohibits the making of a false statement in connection with the acquisition of a firearm. Allen had signed the prescribed form for obtaining a firearm stating that he had never been convicted of a felony. The statement was false, but Allen sought to show that the prior conviction was obtained in violation of his right to counsel. We held the validity of the prior conviction immaterial, distinguishing *Burgett* on the ground that under § 922(a)(6), unlike the Texas recidivist statute, the penalty is not for the prior conviction but rather for the untruthful statement concerning it.

## III.

I do not read the majority opinion to deny the applicability of *Burgett* to § 1202(a) prosecutions; it is implicit from what it says that if Lewis had been successful in post-conviction attack on his earlier conviction, he could not have been convicted under § 1202(a). Rather, its holding is that

[6] The Supreme Court has extended the rule of the inadmissibility of prior uncounseled convictions to sentencing, United States v. Tucker, 404 U.S. 443 (1972), and to impeachment of a defendant who has testified, Loper v. Beto, 405 U.S. 473 (1972).



even an invalid, uncounseled felony conviction is sufficient to bring an accused within the § 1202(a) prohibition on firearms possession, unless the defendant has successfully taken affirmative action to overturn the invalid conviction. To my mind, *Burgett* may not be so limited.

In the first place, it is noteworthy that the Supreme Court has seen no need to impose this requirement. In *Burgett*, the prior uncounseled conviction of the defendant was held inadmissible, even though the defendant had never sought post-conviction relief to have his prior conviction overturned. Similarly, in Loper v. Beto, 405 U.S. 473 (1972), where the Supreme Court forbade the use of a prior uncounseled conviction for purposes of impeaching a defendant, the Court showed no concern over the fact that the defendant had not taken affirmative steps to have his prior conviction declared invalid. And in our own decision in Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968), we held that a state court unconstitutionally considered a prior uncounseled conviction in sentencing a defendant under a habitual offender statute, even though the prior conviction had not been collaterally attacked.

The majority notes the concern expressed in the *Graves* case that allowing a defendant in a § 1202(a) prosecution to raise for the first time the validity of his prior felony conviction would lead to a wasteful "trial-within-a-trial." In *Graves*, however, the defendant alleged that his prior felony conviction was invalid not because of a denial of counsel but rather because of failure to observe the complex due process requirements for transferring cases from juvenile courts, as announced in Kent v. United States, 383 U.S. 541 (1966). The *Graves* court noted the involved factfinding that would be necessary to determine the validity of the prior conviction and specifically contrasted this defense with the simple assertion that a prior con-

viction was invalid for a denial of counsel, as in *Burgett*. Thus, one of the grounds on which *Graves* explicitly distinguished *Burgett* was that "*Burgett* was bottomed on a manifest abrogation of the right to counsel—a constitutional guarantee not asserted here." 544 F.2d at 80.[7]

In contrast to the complex attack on the prior conviction attempted by the defendant in *Graves,* Lewis asserts that it clearly appears on the face of the record of his prior conviction that he was not afforded counsel. Lewis' assertion can be quickly and easily verified without the necessity of conducting an involved "trial-within-a-trial." Indeed, every court of appeals which has addressed the issue has held that a defendant charged with possession or transportation of a firearm by a felon may defend against the charge by asserting for the first time that the prior felony conviction was invalid for denial of the *right to counsel. See, e.g.,* United States v. Lufman, 457 F.2d 165, 168 n.3 (7 Cir. 1972); United States v. Thoresen, 428 F.2d 654, 663-64 (9 Cir. 1970) (decided under former 15 U.S.C. § 902(e)).[8]

[7] The other cases cited by the majority to support its position are likewise inapposite, since the defendants in those cases sought to attack the validity of their prior convictions on grounds other than denial of the right to counsel. *See* Barker v. United States, 579 F.2d 1219 (10 Cir. 1978) (improper jury instructions at prior conviction; further, defendant had waived this defense by pleading guilty to firearms charge); United States v. Maggard, 573 F.2d 926 (6 Cir. 1978) (incompetent performance of counsel at prior conviction); United States v. Bryant, 448 F.S. 139 (D. S.C. 1978) (prior conviction based on uninformed guilty plea).

[8] The government's brief urges that these cases were wrongly decided and directs us instead to two cases in each of which the accused, after he was convicted of a firearms offense and then successfully obtained a court order invalidating the prior felony conviction, was granted relief from the firearms conviction under 28 U.S.C. § 2255. Dameron v. United States, 488 F.2d 724 (5th Cir. 1974); Pasterchik v. United States, 466 F.2d 1367 (9 Cir. 1972) (per curiam). By arguing that these two cases permit affirmance of Lewis' § 1202(a) conviction, the government implicitly concedes that Lewis could at some future time collaterally attack his prior conviction and, if he was successful, could then obtain § 2255 relief from the instant conviction. Since the validity or invalidity of Lewis' prior conviction is apparent from the face of the record and will not require a mini-trial, I think that this argument exults procedure over substance. From the standpoint of judicial efficiency and economy, let alone the unfairness of subjecting Lewis to suffer the indignity of a federal firearms conviction when it is quite clear that he will be able to obtain subsequent § 2255 relief, I see no reason to require it. Certainly nothing in the *Dameron* or *Pasterchik* cases *requires* a defendant to go through this convoluted procedure.



*See also* United States v. DuShane, 435 F.2d 187 (2 Cir. 1970).

## IV.

In short, neither reason nor authority supports a rule that one previously convicted of a felony in violation of his Sixth Amendment right cannot assert the invalidity of that conviction as a defense to a prosecution under § 1202 (a). Thus, I am persuaded that "since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Burgett v. Texas, 389 U.S. at 115. I would therefore reverse the conviction and remand the case for a new trial with directions to receive the record of the prior offense in order to determine whether the prior conviction was obtained in violation of the Sixth Amendment. If it was, in my view defendant cannot be guilty of the crime charged.

**APPENDIX**

**In The**

# Supreme Court of the United States

**October Term, 1978**

NO. 78-1595

GEORGE CALVIN LEWIS, JR.,
*Petitioner,*

**v.**

UNITED STATES OF AMERICA,
*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

**PETITION FOR CERTIORARI FILED**
**APRIL 18, 1979**
**CERTIORARI GRANTED JUNE 18, 1979**

## INDEX

**RELEVANT DOCKET ENTRIES**

November 21, 1977—Indictment returned.

December 1, 1977—Arraignment; plea of not guilty.

December 22, 1977—Trial; jury waived. Not guilty on Count One; guilty on Count Two. Presentence report ordered.

January 18, 1978—Sentencing. Notice of appeal filed.

January 24, 1979—Conviction affirmed by U. S. Court of Appeals.

March 19, 1979—Petition for Rehearing denied.



IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal No. 11-00175-R |
| | ) | |
| GEORGE CALVIN LEWIS, JR. | ) | |

NOVEMBER 1977 TERM—AT RICHMOND

The grand jury charges that on or about the 28th day of January, 1977, at Henrico County, Virginia, in the Eastern District of Virginia and within the jurisdiction of this Court, George Calvin Lewis, Jr., having previously been convicted by a Court of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully receive a firearm, to-wit: One (1) .32 caliber revolver, Model 30, Smith and Wesson, serial number 678858, after said firearm had been previously shipped in interstate commerce.
(In violation of Title 18, United States Code, Section 922 (h)(1).)

COUNT TWO

The grand jury further charges that on or about the 28th day of January, 1977, at Henrico County, Virginia, in the District and jurisdiction aforesaid, George Calvin Lewis, Jr., having previously been convicted by a Court of a felony, did knowingly and unlawfully receive and possess a firearm, to-wit: One (1) .32 caliber revolver, Model 30, Smith and Wesson, serial number 678858, said receipt and possession affecting commerce and after said firearm had previously been shipped in interstate commerce.
(In violation of Title 18, United States Code, App. Section 1202(a)(1).)

**PROCEEDINGS**

(December 22, 1977)

The Clerk:

* * *

Are counsel ready to proceed?

Mr. Metcalf: The Government is ready to proceed.

Mr. Wood: I have a motion, if it please the Court.

The Court: All right, sir.

Mr. Wood: May it please the Court, on behalf of George Lewis, the defendant in this case, we would move the Court for a brief continuance of the matter for the following reasons:

If Your Honor please, he is charged in a two-count indictment. The essence of which is that he received, in one count, and possessed in another, received and possessed a firearm, having been previously convicted of a felony.

Now, if Your Honor please, in 1961—this is the underlying charge—the only felony he has ever been convicted of, allegedly, was in 1961 in Florida where he was convicted of the alleged crime of breaking and entering with intent to commit a misdemeanor, which supposedly is felony under Florida law.

Now, the case of *Gideon* against *Wainwright,* which is a classic, came out of Florida. Gideon was charged with the identical offense as this gentleman.

Gideon was tried in the trial court in Florida approximately six months after this man was tried.

Your Honor, two days ago, or three days ago, it first came to my attention—and perhaps I was derelict in not discovering it earlier—this man in fact had no lawyer.

I called a lawyer in Florida by the name of Harper, who is in Clearwater where this case was tried.

Mr. Harper went to the court, to the records of the county



or Circuit Court where this gentleman was tried. He gave me the following information:

Number one, the record affirmatively shows that he was not represented. It is not a silent record. It affirmatively shows no lawyer.

He was asked by the trial judge on the date of trial, "Do you have a lawyer?" His response was, "No, I do not."

We would proffer evidence that he was in fact indigent at that time.

The judge proceeded to try him on that day. He ordered a pre-sentence investigation of some nature or another. Continued sentencing.

When he came back in March of 1961, I believe it was, he was sentenced to a term of from four months to, I believe, four years or six years, something like that. In addition the lawyer that we talked with in Florida, who I understand to be a very reputable lawyer, told me that in his view the indictment was invalid on its face. That a lawyer would, even a patent lawyer, would have easily have seen that. He tells me that Florida law does and has required that the indictment charge the particular Florida statute under which the gentleman is to be tried. He said the indictment showed no such charge and was invalid on its face.

Additionally, if Your Honor please, and just as importantly, when George Lewis was tried in Florida he was from Richmond. He had gone to Florida with a couple of companions and was locked up down there. He was 17 years old. His birthday is today. He was born December 22, 1943.

For some reason or another the records of the Pinellas County Circuit Court, and indeed the records that the Government has here today, show erroneously his birthday as December 22, 1941.

Now, if Mr. Harper, the lawyer that I spoke with in Florida, told me that apparently the Florida Circuit Court proceeded on the assumption that the man was an adult when in fact he was a juvenile. He tells me that in those days in Florida, Florida had what we now have in Virginia; that is, a separate juvenile system and a separate adult system. That under Florida law, as it existed at that time, this man could not be tried as an adult.

I assume if it is anything like Virginia there would have been a procedure for a transfer, in all probability. But, if Your Honor please, the Court was absolutely without jurisdiction to try this man.

Now, we are not dealing here with what could be a voidable or a potentially voidable conviction. You are dealing with a bad set of facts.

Number one, an indictment which I am told by Florida law is invalid on its face.

Number two, a man who is convicted in violation of *Gideon* against *Wainwright*. And we would proffer evidence that he was in fact indigent and could not afford counsel.

Thirdly, that the Court which tried him had absolutely no jurisdiction to try him in the first place.

The Court: Doesn't he have to exhaust his state remedies, Mr. Wood? Doesn't he have to take appropriate action to have that conviction set aside? This Court is not the proper forum for that, is it?

Mr. Wood: Judge, I would suggest to you, if it please the Court, I have read *United States* against *Allen*, 556 F.2d. 720, which was decided last year by the Fourth Circuit. That case is entirely different than the one you have here. In that case Allen was charged under Section 922(a)(6).

The Court: Six?



Mr. Wood: Yes, sir. Which was lying in order to obtain the weapon. The Fourth Circuit said over and over again he is not being convicted for possessing the firearm, having been convicted of a felony. He is being tried and convicted for lying about it, which is a different thing.

The Court cited the Fifth Circuit.

I readily admit to Your Honor that I have not researched fully the point, for which I apologize, but I have been in other courts in the last couple of days. But, Judge, they cite the Fifth Circuit in which the Fifth Circuit adopts this rule. They agree with the Fourth Circuit on the 922(a)(6) ruling, that is, if one has been convicted of a felony and one lies about it then even though—

The Court: It may be a voidable deal, but that is no defense. It is not a matter of merely being allowed to attack it collaterally or what have you. But it is no defense.

Mr. Wood: I believe, and again I apologize for my lack of research not being exhausted on this point, but the indication that I got from reading the Allen case was that the Fifth Circuit by the same token will allow a collateral attack when the gentleman is charged, as is Mr. Lewis, with the status offense. That is what we are talking about here. That is the status of being a felon.

Now, the Fourth Circuit distinguishes the Supreme Court cases. I can't remember the name. The recidivist case that went up on status and so on. Of course, the law is unsettled that punishment cannot be impressed nor enhanced where the basis for the new conviction in the case of a recidivist, or enhanced penalty, is a former invalid conviction in violation particularly of *Gideon* v. *Wainwright*.

I would emphasize to the Court, I think this makes that difference, too. We are not talking about a case where I put Mr. Lewis on and he says, "Well, I didn't have a lawyer," or something like that. The records of the Florida court

show that affirmatively. I suspect Allen may have some philosophical basis and difficulty and hardship in exploring these matters in the trial court.

The Court: I am at a loss. I do not understand the nature of your motion. You have a motion for a continuance. For what purpose?

Mr. Wood: So that I can obtain the Florida records in proper form to present to you, sir. I found out two days ago. I called Florida and got a lawyer down there who was willing to help me yesterday afternoon.

The Court: Whose fault was that, Mr. Wood? I am not fussing with you, but how long have you had the case?

Mr. Wood: For a month. And I will be honest with you, it never occurred to me that that conviction was invalid. My client is not an educated man, Judge. I am educated, presumably, and I should have caught it earlier. But when I saw the Florida conviction in 1961, I thought Gideon came out of Florida.

The Court: The difficulty is, I am not sure that you have the right to attack it in these proceedings. That is the thing that I have doubt about.

Mr. Wood: Well, the Fourth Circuit does not say I can't. It simply says that a conviction for, or that a voidable conviction cannot be a defense. Not just attack it collaterally or otherwise, or go to the State Court and exhaust and so on. But it can't be a defense in an (a)(6).

The Court: Let me hear the Government's position.

Mr. Metcalf: Well, Your Honor, first off I think that the case law is clear as to the fact that whether he was a juvenile, or the fact that there was a fatal error in the indictment, is not something that can be attacked in this court anyway. It has to be done in the place of jurisdiction to have it set aside. It is a voidable and not avoidable conviction, Your Honor, if what Mr. Wood says is true. Therefore, if it is voidable it is not within the scope of the jurisdiction before the Federal Court at this time.



The Court: Is that really factual? If what he says turns out to be factual? I don't mean that I disbelieve him. I don't mean that. But suppose they tried him as an adult when he was in fact a juvenile?

Mr. Metcalf: Your Honor, I don't know.

The Court: I guess that is voidable?

Mr. Metcalf: Yes, Your Honor.

The Court: Because we have—

Mr. Metcalf: Under Virginia law, I can only analyze with that, you can try them as an adult upon proper certification, et cetera. I don't know what occurred down there.

As to the fact that he had the statute, I think the error in the indictment is a procedural matter and not a constitutional matter. I don't think that it is a requirement at all as long as the defendant is fairly apprised of the charges against him.

The Court: Would he be cut off if he were tried here and convicted and then succeeded in having that Florida conviction set aside? Then he could come back on a 2255. Is that the way you envision it would happen?

Mr. Metcalf: It could be, Your Honor, but I think that the Allen case speaks to that, Your Honor. And the Court in that—and we are talking about Section 922—counsel draws the distinction between (h) and (a)(2). The Court doesn't. The Court is specifically talking about 922(a)(6). But it also refers to 922(d)(1). The entire section of 922 is different than 1202(a)(1), as the Court has asked me to point out in the past.

It refers, Your Honor—it says if you find that Congress intended to restrict the disposition of firearms to those with standing felony convictions, even though the conviction may later be found to be constitutionally invalid, it says

that specifically at page 722 on the second column in the first paragraph.

Further, Your Honor, it says if the act only prohibited the disposition of firearms to constitutionally-convicted felons enforcement would be complicated by collateral issues.

And it said the act alone, because under (a)(6), under the entire act, you don't have to be a convicted felon. You only need to be indicted. It says probable cause alone is sufficient to restrict the issuance of a firearm, and possession of a firearm by that individual. Therefore, Your Honor, I submit that we are not talking about whether—and in fact I can envision that this man may be indicted—let's say he was indicted yesterday and acquitted tomorrow, and he had a firearm. He would have violated the statute.

The Court: Your position, I think, coincides with the Court's understanding of the law, without pronouncing any judgment on it. Your position is that even if the conviction was set aside, he is still prosecutable under this indictment by virtue of the fact that there was an outstanding conviction as of the time of the alleged offense. Is that it?

Mr. Metcalf: Yes, Your Honor.

The Court: All right. I understand your position.

All right, Mr. Wood.

Mr. Wood: Judge, if I may respond—and I hope Your Honor has not made up his mind—but I don't read Allen that way. Allen is an (a)(6) case. They repeat that over and over.

The Court: Well, suppose I read it again, I have read it three or four times.

Mr. Wood: But they point out, and I particularly invite Your Honor's attention, to their citation of the Fifth Circuit which reaches the same result as Allen in (a)(6), but apparently—a different result in the case in which you have here.



The Court: All right. I will take a look at it.

Mr. Wood: I would suggest to the Court a juvenile who is tried as an adult without the procedural safeguards that might be prescribed by statute, that is a void and not avoidable conviction.

The Court: I don't think so in Virginia. As a matter of fact what we have to do under the Fourth Circuit's ruling is if in fact it turns out that he was a juvenile we have to reconstruct to determine whether he would have been certified to be tried as an adult even though he is a juvenile. So it is not void. I don't know the Florida law.

Mr. Wood: I don't either, Judge. That might be a proper scope of inquiry if the continuance were granted.

The Court: The Court will take a brief recess.

(A recess was taken at 10:15 to reconvene at 10:35.)

The Court: The Court has re-read Allen. I have read, in addition, the Third Circuit case of *United States* against *Davis*. I am satisfied that the alleged invalidity of the conviction is at this stage of the proceedings immaterial. The motion for a continuance is denied.

Mr. Wood: All right, Your Honor. I would object to Your Honor's ruling.

* * *

(The testimony was recorded but not transcribed.)

(The following occurred after the government rested)

Mr. Wood: All right, sir.

Judge, we call Mr. Lewis.

May it please the Court, Judge, I am not going to have him testify as to the *Gideon* against *Wainwright* matters that I have mentioned, since the Court has already ruled that that would be irrelevant.

The Court: That's right.

Mr. Wood: Otherwise I would want the record protected on that score.

(The testimony of George Calvin Lewis, Jr., was recorded but not transcribed.)

| | | |
|---|---|---|
| 11,152 Ct. Cr.<br>STATE OF FLORIDA<br>vs.<br>GEORGE C. LEWIS, JR. | ) | Breaking And Entering With Intent To Commit A Misdemeanor. |

The defendant, George C. Lewis, Jr., upon being caused to stand before the bar in the custody of the Sheriff, was asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him and he answering nothing in bar or preclusion thereof, the Judge pronounced the following sentence, to-wit:

"You, George C. Lewis, Jr., having entered a plea of guilty to the crime of Breaking And Entering With Intent To Commit A Misdemeanor, as charged in the Information filed herein, the Court adjudges you to be guilty of Breaking And Entering With Intent To Commit A Misdemeanor, as charged in the Information filed herein.

"It is further considered, ordered and adjudged, that you be imprisoned by confinement and committed to the custody of the department of corrections for a term of six months to four years; less the time spent in the Couny Jail of Pinellas Couny, Florida, to-wit: seventy-two days."

Thereupon the defendant was remanded to the custody of the Sheriff.

Government Exhibit No. 4.



| | | |
|---|---|---|
| 11,153 Ct. Cr.<br>STATE OF FLORIDA<br>vs.<br>GEORGE C. LEWIS, JR. | ) | Breaking And Entering With Intent To Commit A Misdemeanor. |

The defendant, George C. Lewis, Jr., upon being caused to stand before the bar in the custody of the Sheriff, was asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him and he answering nothing in bar or preclusion thereof, the Judge pronounced the following sentence, to-wit:

"You, George C. Lewis, Jr., having entered a plea of guilty to the crime of Breaking And Entering With Intent To Commit A Misdemeanor, as charged in the Information filed herein, the Court adjudges you to be guilty of Breaking And Entering With Intent To Commit A Misdemeanor, as charged in the Information filed herein.

"It is further considered, ordered and adjudged, that you be imprisoned by confinement and committed to the custody of the department of correcions for a term of six months to four years."

"It is further considered and ordered that the sentence imposed in this cause shall run concurrently with that certain sentence heretofore imposed upon you in this c- in case No. 11,152 Circuit Criminal."

Thereupon the defendant was remanded to the custody of the Sheriff.

JUDGMENT AND PROBATION/COMMITMENT ORDER

January 18, 1978

Defendant has been convicted as charged of the offense(s) of receipt and possession by a convicted felon of

a firearm which had previously been shipped in interstate commerce in violation of Title 18, U.S.C., Appendix Section 1202(a)(1) as charged in Count 2 of the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and six (6) months on Count 2 of the indictment.

The defendant shall become eligible for a parole at such time as the Parole Commission may determine pursuant to Title 18, U.S.C., Section 4205(b)(2).

The execution of the sentence imposed herein is hereby suspended until 9:00 a.m. on the first business day following notification to counsel for the defendant by the United States Court of Appeals for the Fourth Circuit that they have disposed of the defendant's appeal.

Signed by U.S. District Judge.



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 78-5073

---

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE CALVIN LEWIS, JR.,
Appellant.

---

Argued: October 6, 1978 Decided: January 24, 1979

---

RUSSELL, CIRCUIT JUDGE:

This appeal presents for decision whether a defendant, charged as a convicted felon with the possession of a firearm in violation of § 1202(a)(1), 18 U.S.C. App., may defend by claiming for the first time that his felony conviction was constitutionally invalid. The facts giving rise to this question in this case are not in dispute. The defendant does not deny on this appeal the receipt and possession of a firearm. Neither does he dispute his earlier conviction in Florida or that such conviction is facially valid. It is further conceded that prior to his receipt and possession of the firearm and prior to his trial in this case, he had not collaterally attacked in any post-conviction proceeding this extant conviction. He does claim as his sole defense, though, that his felony conviction was invalid because he was denied the assistance

of counsel, and he sought to offer evidence in support of such claim. The district court refused to admit any such evidence and held that, in a prosecution under § 1202(a)(1), the defendant may not defend by seeking at trial to impeach on constitutional grounds his earlier felony conviction. After conviction, he appealed, contending that this ruling, denying him the right to attack collaterally his earlier felony conviction in his § 1202(a)(1) prosecution was in error. We perceive no error in the ruling and affirm the conviction.

The Gun Control Act, an integral part of the Omnibus Crime Control and Safe Streets Act of 1968,[1] was intended to bar certain classes of persons from possessing or receiving firearms and to limit possession of firearms to "persons who are responsible and law-abiding."[2] The right of Congress, in the interest of public safety, to enact such legislation and to establish the classifications of persons who might not possess firearms has never been questioned. *United States* v. *Samson* (1st Cir. 1976) 533 F.2d 721, 722, *cert. denied* 429 U.S. 845. Congress has identified in that Act as a class not permitted to possess or receive firearms "[a]ny person who—(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony." § 1202(a)(1). What Congress intended by this section, as the legislative history as well as the statutory

[1] The Omnibus Crime Control and Safe Streets Act of 1968 consists of two Titles relating to the possession of firearms. § 922 is a part of Title IV and § 1202 is a part of Title VII. Title IV was the original firearm section but Title VII was added during Senate consideration of the Act and was intended, according to its author, to complement Title IV. There is of course considerable overlap of the two Titles but each was seeking to deal with the same evil under similar prohibitory procedures. For a discussion of the legislative history of the two Titles, *see United States* v. *Bass* (1971) 404 U.S. 336, 341-346 and *Hyland* v. *Fukuda* (9th Cir. 1978) 580 F.2d 977, 979, note 3.

[2] *Barker* v. *United States* (10th Cir. 1978) 579 F.2d 1219, 1226.



language itself makes clear, is that any person within this status class of a convicted felon, whose conviction was not facially invalid and whose conviction had "not been invalidated as of the time the firearm is possessed," is subject to the statutory prohibition stated in § 1202(a)(1), and this is true though his "status as a convicted felon changed after the date of possession, *Regardless of how that change of status occurred.*" (Italics added) This was the construction given the statute by Judge Hufstedler in the earliest case to consider the application of 1202(a)(1). *United States* v. *Liles* (9th Cir. 1970) 432 F.2d 18, 20.[3]

In *Liles,* the defendant's conviction under 1202(a)(1) was affirmed "notwithstanding the fact that the prior conviction, which was an essential element of the firearms conviction, was reversed one day before he was convicted of the firearms offense. It was there held that Liles' possession of the revolver was unlawful for *one of his* status at the time he possessed it. It was not made lawful by the subsequent reversal of his prior felony conviction."[4] The rule in

[3] In *McHenry* v. *People of State of California* (9th Cir. 1971) 447 F.2d 470 at 471-472, an entirely different panel of this Circuit sought over a strong dissent to restrict *Liles* to the situation where "the prior felony conviction was reversed because of insufficient evidence" and not where it was reversed for some constitutional defect. 447 F.2d at 471. For reasons later stated herein, it appears to us that one whose conviction is invalidated for want of evidence stands in a stronger position than one whose conviction is reversed and remanded for another trial because of a constitutional defect. We agree with the comment of the dissenting judge in *McHenry,* who wrote (477 F.2d at 472):

> "After oral argument, we invited supplemental briefs and a discussion of *Liles*. The parties have been unable to distinguish it from the case before us, nor can I."

[4] (Italics in opinion) This summarization of the ruling in *Liles* is taken from *Barker, supra* (579 F.2d at 1226).

*Liles* was followed in *United States* v. *Williams* (8th Cir. 1973) 484 F.2d 428, 430, even though the conviction in that case had been dismissed.

*Liles* would seem to be applicable, whatever the basis on which the felony conviction may subsequently have been reversed or invalidated. This would include subsequent invalidation for constitutional error in the conviction.

We apprehend no legal difference between a subsequent reversal for a denial of a constitutional right and one based on some other error; both are equally invalid. It must be conceded, however, that the equities are more in favor of the defendant whose felony conviction is subsequently reversed on appeal for insufficiency of evidence than one whose conviction is reversed for failure to afford counsel to the defendant.[5] In the former case, the defendant is acquitted and found never to have been guilty; in the latter, the conviction is merely reversed and the defendant is subject to retrial and possible conviction anew. Unquestionably, the defendant in the latter case, who has not been found guilty, should have no greater right than the defendant in the former case, who was adjudged not guilty. That is, though, precisely the position of the appellant.

This position of the appellant is contrary to the manifest legislative purpose of § 1202(a)(1) and related legislation, as we declared it in *United States* v. *Allen* (4th Cir. 1977) 556 F.2d 720. In that case, we said that by its firearms legislation "Congress intended to restrict the disposition of firearms to those with *standing* felony convictions *even though the convictions may later be found constitutionally invalid.*"[6] This construction of the legislation as stated in *Allen* was also expressed by the Court in *United States* v. *Graves* (3d Cir. 1977) 554 F.2d 65, 69, a case cited with approval in *Allen*. In that case, the Court said:

---

[5] *See, United States* v. *Williams, supra* (484 F.2d at 430).

[6] (Italics added.) 556 F.2d at 722.



> "These materials (*i.e.*, '(a) the language of the statutes, (b) the legislative history, and (c) the opinions of other courts which have endeavored to interpret the statutes') suggest that the legislative draftsmen desired persons with extant, though arguably unconstitutional, convictions to forbear from the purchase and possession of firearms until their convictions are voided by the courts or until they are freed from such disability by executive action. Failure to so refrain was intended to subject such persons to the penalties specified in the Act."

Assuredly Congress never intended that prosecutions under this legislation should be encumbered with collateral issues attacking the validity of a facially valid conviction, either because, as in *Williams,* the conviction had subsequently been reversed on account of insufficiency of evidence, or, as here, because of a constitutional claim of denial of counsel. So much we declared in *Allen,* where we said that "[t]he scheme [of prosecution under the legislation] adopted by Congress avoids the time-consuming collateral issues."[7] This view as set forth in *Allen* was recently upheld in *United States* v. *Maggard* (6th Cir. 1978) 573 F.2d 926. In that case, the Court said that "the legislative history of § 1202 indicates that Congress intended to make the proof of the fact of a prior felony conviction the sole predicate for the prohibition against possession of a weapon" and neither "Congress [nor] the Supreme Court has required or suggested that a court to which a § 1202 indictment is assigned

---

[7] 556 F.2d at 723.

*Allen,* it is true, involved a false statement prosecution under § 922(a)(6) and not a status prosecution such as here but the quoted reasoning is equally applicable to either type of prosecution and has been generally so construed. *See, United States* v. *Bryant* (D. S.C. 1978) 448 F.Supp. 139, 144.

for trial must routinely retry the constitutional validity of the predicate offense."[8]

The appellant argues that, irrespective of legislative purpose, a conviction under § 1202(a)(1), which includes as an essential element a felony conviction, cannot stand if it can be shown in the 1202 prosecution that the defendant's constitutional right to counsel was denied at his felony conviction. This, he asserts, is the command of *Burgett* v. *Texas* (1967) 389 U.S. 109, which, in his view, makes the felony conviction "void from the outset" and not usable "for any purpose." This argument, if sustained, would mean that the Government, at any time a defendant chooses to raise the issue, would be obligated to prove in a firearms prosecution that the underlying felony conviction was free of constitutional error. *Allen* refused to read *Burgett* "so broadly" or to find, as the defendant would argue, "that a conviction in violation of *Gideon* is absolutely meaningless" in this context.[9] We declared there that Congress had a right to prohibit a person subject to an extant felony conviction, "even though * * * obtained in violation of *Gideon*," from possessing a firearm. We said:

> "Although *Burgett, Tucker* and *Loper* established that a conviction in violation of the right to counsel is too unreliable to show guilt or enhance punishment under a recidivist statute, to form the basis for an increased sentence, or to be used to impeach general credibility, they do not say that a conviction in violation of *Gideon* is absolutely meaningless. The reliability of an indictment as an indication of probable cause to believe that a certain person has committed a crime does not depend on the presence of defense counsel for those under investigation. * * * (citing cases) Nor does

[8] 573 F.2d at 928 and 929.
[9] 556 F.2d at 723.



> the absence of defense counsel or the lack of a waiver of the assistance of counsel render a prior felony conviction invalid or unreliable as an indication that the public interest requires that the convicted person's access to firearms be restricted when the conviction has not been reversed or vacated and the defendant remains unpardoned. We think that Congress is entitled to rely on a prior standing conviction as proof that there is probable cause to believe the convicted person has been involved in criminal activity and should not be able to buy a gun without first showing that he is no threat to public safety, even though the conviction may have been obtained in violation of *Gideon*."

*Graves* sounded the same warning and reached the same conclusion (554 F.2d at 83):

> "As a final point, we recognize that to extend *Burgett* to prosecutions under the Gun Control Act might well create a new method of collateral attack, *i.e.*, a re-evaluation of the constitutionality of prior criminal proceedings within a trial of a weapons offense. To obtain a firearms conviction, under the approach pressed by Graves, the government would have to demonstrate the constitutional validity of outstanding convictions—at whenever a defendant so insists. Yet, there is no evidence that Congress intended this type of procedure—a 'trial-within-a-trial'—when it enacted the firearms legislation. Nor is there anything in *Burgett* or its descendants to indicate that the Supreme Court commanded such an arrangement. Consequently, this Court should not sanction a program which appears to be at variance with the intent of Congress and goes a substantial step beyond the teachings of *Burgett*."

We recognize that there are cases which take a contrary view to that expressed by us.[10] We do not find them per-

[10] *United States* v. *Pricepaul* (9th Cir. 1976) 540 F.2d 417, 424, *Dameron* v. *United States* (5th Cir. 1974) 488 F.2d 724, 727, *United*

suasive nor do they answer the thoughtful opinion of Chief Judge Haynsworth in *Allen,* and the substantial number of cases which have taken a like view with him.[11] We accordingly conclude that Congress had the constitutional power, in the promotion of public safety to prohibit under criminal penalties any person subject to an outstanding facially valid felony conviction, which, though arguably constitutionally invalid, had not been earlier invalidated, from possessing and receiving firearms and that it did so by § 1202(a)(1).

The conviction of the defendant is accordingly

AFFIRMED.

---

*States* v. *Lufman* (7th Cir. 1972) 457 F.2d 165, 167, *United States* v. *DuShane* (2d Cir. 1970) 435 F.2d 187, 190, and *United States* v. *Mason* (D. Md. 1975) 68 F.R.D. 619, 625.

[11] *Barker* v. *United States* (10th Cir. 1978) 579 F.2d 1219, 1226, *United States* v. *Maggard,* (6th Cir. 1978) 573 F.2d 926, 928-929, *United States* v. *Graves* (3d Cir. 1977) 554 F.2d 65, 80-81, and *United States* v. *Bryant* (D. S.C. 1978) 448 F. Supp. 139, 141.

The Eighth Circuit has reserved judgment on status type cases. *United States v. Edwards* (8th Cir. 1977) 568 F.2d 68, 72.



WINTER, CIRCUIT JUDGE, dissenting:

The majority decides that one prosecuted for an alleged violation of 18 U.S.C. App. § 1202(a)(1)[1] cannot defend on the ground that the prior conviction for a felony rendering his receipt or possession of a firearm a violation of law was obtained in violation of the Sixth Amendment. Because I believe that § 1202(a) does not place on the defendant the burden of affirmatively seeking to vacate a conviction manifestly invalid because of the denial of counsel, I respectfully dissent.

## I.

As this case comes to us, I do not understand, as the majority asserts, that defendant concedes the "facial" validity of his earlier conviction. He asserts that the record of that conviction shows that he was unrepresented by counsel and that the conviction is void on its face. The district court declined to consider the record of the prior conviction, ruling it immaterial. In arguing the correctness of the district court's ruling, the government in effect concedes that for present purposes the conviction was obtained in violation of defendant's Sixth Amendment rights. For purposes of this appeal, we must treat that as a fact.

The majority's interpretation of § 1202(a) rests on the premise that Congress meant to punish the possession of a firearm by a person who has been convicted of a felony, even if that conviction was obtained in total disregard of his constitutional right to the assistance of counsel. I am reluctant to attribute to Congress such a cavalier attitude

---

[1] § 1202(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined . . . or imprisoned . . . .

toward one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).[2] Moreover, I find insubstantial support for the conclusion.

Section 1202 was introduced as a last-minute amendment on the floor of the Senate. It is therefore doubtful that Congress gave full consideration either way to the matter of the constitutional validity of the prior felony conviction.[3] Even the opinion in United States v. Graves, 554 F.2d 65 (3 Cir. 1977), upon which the majority heavily relies, admits that "the applicable legislative record is somewhat limited in scope and does not speak directly to the precise issues raised in this case," and that the legislative intent must be gleaned from "some clues" in the statutory history. *Id.* at 73.[4]

In any event, it is axiomatic that a statute should be read, if possible, to avoid a construction that would render it unconstitutional.[5] *See, e.g.*, United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Vuitch, 402 U.S. 62, 70 (1971). In my view, the majority's construction of § 1202(a) runs afoul of that rule.

[2] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." United States v. Graves, 554 F.2d 65, 82 n.68 (3 Cir. 1977) (quoting Schaefer, *Federalism and State Criminal Trials,* 70 Harv. L. Rev. 1, 8 1956)).

[3] "Title VII [which includes § 1202] was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report." United States v. Bass, 404 U.S. 336, 344 (1971). The amendment, introduced by Senator Long, received a favorable but cautious reaction on the Senate floor, but suggestions for further study and modification were preempted by an unexpected call for a vote. Title VII received similarly scant attention in the House. *See id.* at 344 n.11.

[4] The majority also seeks support for its statutory interpretation in United States v. Allen, 556 F.2d 720 (4th Cir. 1977), but that case dealt not with § 1202(a) but with 18 U.S.C. § 922, which prohibits the giving of a false statement in connection with the purchase of a firearm. Unlike § 922, § 1202(a) requires a *conviction* for a felony, not merely an indictment or a statement about prior criminal activity. Thus, the reasoning in *Allen* that mere probable cause to believe that a person has committed a felony, rather than a reliable conviction, is enough to restrict his ability to possess a firearm and to support a conviction is inapplicable to § 1202(a). While § 922 is a part of Title IV of the Omnibus Crime Control and Safe Streets Act, § 1202(a) is part of Title VII of that Act. In another context, the Supreme Court has cautioned us that these titles must not be assumed to "dovetail neatly." United States v. Bass, 404 U.S. 336, 344 (1971). *See also* United States v. Graves, 554 F.2d 65, 87 (3 Cir. 1977) (Garth, J., concurring in part and dissenting in part). Moreover, as I discuss below, the exact holding of *Allen* was that § 922(a)(6) penalized making false statements rather than being a felon. Broader and more general language in *Allen* is thus dictum.

[5] The opinion in United States v. Liles, 432 F.2d 18 (9 Cir. 1970), on which the majority heavily relies to support its statutory interpretation, gives no indication that it ever considered the implications of Burgett v. Texas, 389 U.S. 109 (1967). This omission is not surprising, since the prior conviction in *Liles* was asserted to be invalid on grounds of substantive state law, not considered in *Burgett.* Nor is it surprising that on four separate occasions, the Ninth Circuit, when faced with the problem of *Burgett,* has ruled that the constitutional invalidity of a prior felony conviction may be asserted as a defense to a charge of possession or transportation of a firearm by a felon. United States v. Pricepaul, 540 F.2d 417 (9th Cir. 1976); Pasterchik v. United States, 466 F.2d 1367 (9th Cir. 1972) (per curiam); McHenry v. California, 447 F.2d 470 (9th Cir. 1971); United States v. Thoresen, 428 F.2d 654 (9 Cir. 1970).



## II.

I had thought that, as a matter of constitutional law, Burgett v. Texas, 389 U.S. 109 (1967), prohibited the very thing that was done here. *Burgett* held that the record of a prior conviction which showed on its face that the conviction was obtained in violation of the right to counsel was inadmissible in a prosecution under a Texas recidivist statute. "To permit a conviction obtained in violation of *Gideon*

v. *Wainwright* [372 U.S. 335 (1963)] to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Id.* at 115.[6] Here, defendant's receipt and possession of a firearm was illegal solely because he had been previously convicted of a felony. A necessary element of the crime was proof that he had been convicted of a felony and the government's only proof was that of a conviction which had been obtained without counsel. The conclusion is inescapable that the prior offense supported the determination of guilt for the instant offense in violation of *Burgett*.

Our decision in United States v. Allen, 556 F.2d 720 (4 Cir. 1977), does not lead to a contrary conclusion. *Allen* concerned a prosecution under 18 U.S.C. § 922(a)(6) which prohibits the making of a false statement in connection with the acquisition of a firearm. Allen had signed the prescribed form for obtaining a firearm stating that he had never been convicted of a felony. The statement was false, but Allen sought to show that the prior conviction was obtained in violation of his right to counsel. We held the validity of the prior conviction immaterial, distinguishing *Burgett* on the ground that under § 922(a)(6), unlike the Texas recidivist statute, the penalty is not for the prior conviction but rather for the untruthful statement concerning it.

III.

I do not read the majority opinion to deny the applicability of *Burgett* to § 1202(a) prosecutions; it is implicit from what it says that if Lewis had been successful in post-conviction attack on his earlier conviction, he could not have

[6] The Supreme Court has extended the rule of the inadmissibility of prior uncounseled convictions to sentencing, United States v. Tucker, 404 U.S. 443 (1972), and to impeachment of a defendant who has testified, Loper v. Beto, 405 U.S. 473 (1972).



been convicted under § 1202(a). Rather, its holding is that even an invalid, uncounseled felony conviction is sufficient to bring an accused within the § 1202(a) prohibition on firearms possession, unless the defendant has successfully taken affirmative action to overturn the invalid conviction. To my mind, *Burgett* may not be so limited.

In the first place, it is noteworthy that the Supreme Court has seen no need to impose this requirement. In *Burgett*, the prior uncounseled conviction of the defendant was held inadmissible, even though the defendant had never sought post-conviction relief to have his prior conviction overturned. Similarly, in Loper v. Beto, 405 U.S. 473 (1972), where the Supreme Court forbade the use of a prior uncounseled conviction for purposes of impeaching a defendant, the Court showed no concern over the fact that the defendant had not taken affirmative steps to have his prior conviction declared invalid. And in our own decision in Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968), we held that a state court unconstitutionally considered a prior uncounseled conviction in sentencing a defendant under a habitual offender statute, even though the prior conviction had not been collaterally attacked.

The majority notes the concern expressed in the *Graves* case that allowing a defendant in a § 1202(a) prosecution to raise for the first time the validity of his prior felony conviction would lead to a wasteful "trial-within-a-trial." In *Graves*, however, the defendant alleged that his prior felony conviction was invalid not because of a denial of counsel but rather because of failure to observe the complex due process requirements for transferring cases from juvenile courts, as announced in Kent v. United States, 383 U.S. 541 (1966). The *Graves* court noted the involved factfinding that would be necessary to determine the validity of the prior conviction and specifically contrasted

this defense with the simple assertion that a prior conviction was invalid for a denial of counsel, as in *Burgett*. Thus, one of the grounds on which *Graves* explicitly distinguished *Burgett* was that "*Burgett* was bottomed on a manifest abrogation of the right to counsel—a constitutional guarantee not asserted here." 544 F.2d at 80.[7]

In contrast to the complex attack on the prior conviction attempted by the defendant in *Graves*, Lewis asserts that it clearly appears on the face of the record of his prior conviction that he was not afforded counsel. Lewis' assertion can be quickly and easily verified without the necessity of conducting an involved "trial-within-a-trial." Indeed, every court of appeals which has addressed the issue has held that a defendant charged with possession or transportation of a firearm by a felon may defend against the charge by asserting for the first time that the prior felony conviction was invalid for denial of the *right to counsel*. *See, e.g.*, United States v. Lufman, 457 F.2d 165, 168 n.3 (7 Cir. 1972); United States v. Thoresen, 428 F.2d 654, 663-64 (9 Cir. 1970) (decided under former 15 U.S.C. § 902(e)).[8]

[7] The other cases cited by the majority to support its position are likewise inapposite, since the defendants in those cases sought to attack the validity of their prior convictions on grounds other than denial of the right to counsel. *See* Barker v. United States, 579 F.2d 1219 (10 Cir. 1978) (improper jury instructions at prior conviction; further, defendant had waived this defense by pleading guilty to firearms charge); United States v. Maggard, 573 F.2d 926 (6 Cir. 1978) (incompetent performance of counsel at prior conviction); United States v. Bryant, 448 F.S. 139 (D. S.C. 1978) (prior conviction based on uninformed guilty plea).

[8] The government's brief urges that these cases were wrongly decided and directs us instead to two cases in each of which the accused, after he was convicted of a firearms offense and then successfully obtained a court order invalidating the prior felony conviction, was granted relief from the firearms conviction under 28 U.S.C. § 2255. Dameron v. United States, 488 F.2d 724 (5th Cir. 1974); Pasterchik v. United States, 466 F.2d 1367 (9 Cir. 1972) (per curiam). By arguing that these two cases permit affirmance of Lewis' § 1202(a) conviction, the government implicitly concedes that Lewis could at some future time collaterally attack his prior conviction and, if he was successful, could then obtain § 2255 relief from the instant conviction. Since the validity or invalidity of Lewis' prior conviction is apparent from the face of the record and will not require a mini-trial, I think that this argument exults procedure over substance. From the standpoint of judicial efficiency and economy, let alone the unfairness of subjecting Lewis to suffer the indignity of a federal firearms conviction when it is quite clear that he will be able to obtain subsequent § 2255 relief, I see no reason to require it. Certainly nothing in the *Dameron* or *Pasterchik* cases *requires* a defendant to go through this convoluted procedure.



*See also* United States v. DuShane, 435 F.2d 187 (2 Cir. 1970).

## IV.

In short, neither reason nor authority supports a rule that one previously convicted of a felony in violation of his Sixth Amendment right cannot assert the invalidity of that conviction as a defense to a prosecution under § 1202(a). Thus, I am persuaded that "since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Burgett v. Texas, 389 U.S. at 115. I would therefore reverse the conviction and remand the case for a new trial with directions to receive the record of the prior offense in order to determine whether the prior conviction was obtained in violation of the Sixth Amendment. If it was, in my view defendant cannot be guilty of the crime charged.

**JUDGMENT**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5073

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE CALVIN LEWIS, JR.,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5073

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE CALVIN LEWIS, JR.,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert Merhige, Jr., District Judge.

Upon consideration of the appellant's petition for rehearing and the appellants' motion for stay of mandate, by counsel,

It is ordered that:

1. the petition for rehearing is denied;

2. the motion for stay of mandate for 30 days from the date of this order to permit the filing of a petition for a writ of certiorari is granted.

Entered at the direction of Judge Russell with the concurrence of Judge Cowan (U.S. Court of Claims). Judge Winter dissents.

SUPREME COURT OF THE UNITED STATES

No. 78-1595

GEORGE CALVIN LEWIS, JR.,
Petitioner,

v.

UNITED STATES

Order allowing certiorari. Filed June 18, 1979.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

No. 78-1595

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

GEORGE CALVIN LEWIS, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

JOEL M. GERSHOWITZ
*Attorney*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

---

No. 78-1595

GEORGE CALVIN LEWIS, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 591 F.2d 978.

### JURISDICTION

The judgment of the court of appeals was entered on January 24, 1979. A petition for rehearing was denied on March 19, 1979. The petition for a writ of certiorari was filed on April 18, 1979. The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether a defendant who is a previously convicted felon may challenge the constitutionality of his prior conviction as a defense to a prosecution for unlawfully possessing a firearm.

## STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner, who had previously been convicted of a felony, was convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner received a sentence of 18 months' imprisonment. A divided panel of the court of appeals affirmed (Pet. App. 1-15).

The undisputed evidence at trial showed that on January 28, 1977, petitioner possessed a .32 caliber revolver that had previously been shipped in interstate commerce. In addition, petitioner acknowledged that in 1961 he had been convicted in Florida state court of the felony of breaking and entering with intent to commit a misdemeanor.

Shortly before trial, petitioner's counsel advised the court that he had information that petitioner had not been represented by counsel at his 1961 Florida trial. He contended that a conviction for violation of Section 1202(a)(1) could not be predicated on a prior conviction obtained in violation of petitioner's Sixth



Amendment rights. The district court, however, ruled that the constitutionality of the Florida conviction was immaterial with regard to petitioner's status as a previously convicted felon for purposes of Section 1202(a)(1). Accordingly, petitioner did not present any evidence on whether in fact he had been convicted in 1961 without the aid of counsel.

## DISCUSSION

This case presents an important and recurring question under the federal gun laws. The courts of appeals have divided over whether an allegedly unconstitutional prior felony conviction may serve as the predicate for prosecuting a previously convicted felon who has received, possessed, or transported a firearm in violation of 18 U.S.C. 922(g)(1), 922(h)(1), or App. 1202(a)(1). See, *e.g.*, *United States* v. *Edwards*, 568 F.2d 68, 72 n.3 (8th Cir. 1977) (noting conflict without deciding the issue). Although we believe that this issue was correctly decided against petitioner, we do not oppose his petition for a writ of certiorari in light of the conflict among the courts of appeals.

1. As the court of appeals recognized (Pet. App. 8), there is a conflict among the circuit courts as to whether and in what circumstances a defendant may raise the invalidity of his prior conviction as a defense to a prosecution for unlawfully possessing, receiving or transporting a firearm in violation of 18 U.S.C. 922(g)(1), 922(h)(1), or App. 1202(a)

(1).[1] In addition to the instant holding both the Third and the Tenth Circuits have held that at least some categories of unconstitutional convictions may be the basis for a valid conviction under either Section 1202 or Section 922. See *United States* v. *Graves*, 554 F.2d 65, 68-70, 73-75, 76-82 (3d Cir. 1977) (en banc) (Section 1202(a)(1)); and *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978) (Section 922(h)(1)).[2] Conversely, the Fifth,

[1] Petitioner was convicted of violating Section 1202(a)(1). Although that statute differs substantially in scope from Sections 922(g) and 922(h), see *United States* v. *Batchelder*, No. 78-776 (argued Apr. 18, 1979), the three statutes are seemingly identical with regard to the issue presented by this case. Thus the various statutes were simultaneously enacted by Congress as separate provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 225-235, 236-237. And the pertinent language of the provisions is virtually the same insofar as all three sections prohibit any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year from obtaining firearms. See 18 U.S.C. 921(a)(20)), 922(g)(1), 922(h)(1), App. 1202(a)(1), and App. 1202(c)(2). Accordingly, we do not believe that decisions involving Section 1202 may be distinguished from those involving Section 922 with regard to the issue presented here. In any event, we further note that the decision below is in square conflict with *United States* v. *Pricepaul*, 540 F.2d 417 (9th Cir. 1976), and *United States* v. *Lufman*, 457 F.2d 165 (7th Cir. 1972).

[2] Both *Graves* and *Barker* involved a prior conviction that was allegedly unconstitutional as a matter of due process of law rather than a denial of the Sixth Amendment right to counsel that was alleged here. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). The *Graves* court specifically indicated that it might reach a different result if a Sixth Amendment violation were involved. See 554 F.2d at 82 & n.68. See also *United*



Sixth, and Seventh Circuits have stated that a prosecution under either Section 1202 or Section 922 may not be predicated on a prior conviction that was obtained without counsel. See *Dameron* v. *United States*, 488 F.2d 724 (5th Cir. 1974) (Section 922(g)); *United States* v. *Maggard*, 573 F.2d 926 (6th Cir. 1978) (Section 1202(a); dictum); *United States* v. *Lufman*, 457 F.2d 165 (7th Cir. 1972) (Section 1202(a)). See also *United States* v. *DuShane*, 435 F.2d 187, 189-190 (2d Cir. 1970) (Second Circuit reached same result under predecessor statute to Section 1202). Moreover, the Ninth Circuit has concluded that a defendant may not be convicted under Section 1202(a)(1) if his prior conviction was obtained in violation of any federal constitutional right that implicates "the judicial guilt-determination process." *United States* v. *Pricepaul*, 540 F.2d 417, 421 (9th Cir. 1976). Cf. *United States* v. *Liles*, 432 F.2d 18 (9th Cir. 1970).[3]

*States* v. *Maggard*, 573 F.2d 926 (6th Cir. 1978) (only constitutional violations appearing on the face of the prior conviction may be raised as a defense to prosecution under Section 1202; ineffective assistance of counsel distinguished from complete absence of counsel). In *Barker*, the Tenth Circuit broadly held that "an underlying prior conviction will apply in a federal firearm prosecution if it has not been challenged on appeal or by collateral attack." 579 F.2d at 1226.

[3] There appears to be a related conflict among the courts of appeals regarding whether a defendant may raise the invalidity of a prior conviction as a defense to a prosecution for making a false statement in connection with the acquisition of a firearm. See 18 U.S.C. 922(a)(6). All of the circuit courts that have considered this question except the Ninth Circuit have held that the constitutionality of the prior con-

2. The courts below correctly concluded that petitioner may not raise the alleged unconstitutionality of his prior conviction as a defense to a prosecution under Section 1202(a)(1). That statute broadly declares that no "person who * * * has been convicted by a court * * * of a felony" shall receive, possess or transport firearms. No exception is made for persons whose convictions are for any reason invalid (provided, of course, that they have not been set aside prior to the alleged offense). To the contrary, the language of Section 1202 strongly suggests that it is the fact of conviction that imposes a disability on an individual. See *United States* v. *Graves*, *supra*, 554 F.2d at 69.[4]

The conclusion of the court of appeals is further buttressed by the express enumeration of the limited exceptions to Section 1202(a)(1) found in Section

---

viction is immaterial to a prosecution under Section 922(a)(6). Compare *United States* v. *Graves*, *supra*; *United States* v. *Allen*, 556 F.2d 720 (4th Cir. 1977); *United States* v. *Ransom*, 545 F.2d 481 (5th Cir.), cert. denied, 434 U.S. 908 (1977); *Cassity* v. *United States*, 521 F.2d 1320 (6th Cir. 1975); *United States* v. *Edwards*, *supra*, with *United States* v. *Pricepaul*, *supra*.

[4] Congress could reasonably assume that the fact of conviction was a strong indicator of potential irresponsibility and dangerousness, even if that conviction was subject to collateral attack. See *Scarborough* v. *United States*, 431 U.S. 563, 571-572 (1977); *United States* v. *Liles*, *supra*. See also 18 U.S.C. App. 1201. Indeed, Section 922(h)(1) prohibits any one under indictment for a felony from receiving a firearm, regardless of whether that person is later acquitted. See, *e.g.*, *United States* v. *Pricepaul*, *supra*, 540 F.2d at 421; *DePugh* v. *United States*, 393 F.2d 367 (8th Cir.), cert. denied, 393 U.S. 832 (1968).



1203. Section 1203 provides that the only felons who are exempt from the prohibitions of Section 1202(a)(1) are those who have been entrusted with a weapon by a prison authority and those who have obtained a specific pardon meeting the requirements of Section 1203(2). The existence of these two specific exemptions belies petitioner's contention that felons who have never challenged their convictions are exempted from the purview of Section 1202(a)(1).[5] And the legislative history clearly reflects Congress' understanding that the fact of conviction terminated a person's right to possess a firearm, subject only to the exceptions of Section 1203. See 114 Cong. Rec. 13868-13869, 14773-14774 (1968) (remarks of Sen. Long, sponsor of Section 1202).

Finally, we do not believe that *Burgett* v. *Texas*, 389 U.S. 109 (1967), and its progeny[6] mandate a different result here. The *Burgett* line of cases stand for the proposition that convictions obtained without

---

[5] We further note that the contrary conclusion could seriously hamper the comprehensive regulation of firearms established in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 225-235, as modified by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213-1226 (codified at 18 U.S.C. 921-928). Section 922(d)(1) prohibits a firearm dealer from transfering a firearm to anyone he has reasonable cause to believe has been convicted of a felony. This simple and effective prohibition would be rendered nugatory if a convicted felon could relieve the dealer of responsibility by stating that he believed his prior conviction to be unconstitutional.

[6] See *United States* v. *Tucker*, 404 U.S. 443 (1972); *Loper* v. *Beto*, 405 U.S. 473 (1972).

counsel cannot reliably be used for certain purposes. This Court has never suggested, however, that the Constitution precludes mere recognition of an uncounseled conviction as historical fact or that Congress could not constitutionally prohibit a person who has been convicted of a felony from possessing firearms until such time as he successfully challenges his conviction or obtains a pardon in accordance with Section 1203(2). Thus, just as Congress reasonably concluded that the fact of indictment warrants imposition of a disability, see note 4, *supra*, so too Congress could constitutionally bar a convicted felon from receiving or possessing a firearm, regardless of whether that conviction was obtained in violation of the Sixth Amendment. See, Note, *Prior Convictions and the Gun Control Act of 1968*, 76 Colum. L. Rev. 326, 336-339 (1976) (concluding that any collaterally unchallenged conviction is a valid predicate felony for purposes of the Act).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

JOEL M. GERSHOWITZ
*Attorney*

MAY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 294208 399

In The

# Supreme Court of the United States

October Term, 1978

NO. 78-1595

GEORGE CALVIN LEWIS, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF FOR THE PETITIONER

ANDREW W. WOOD
J. HATCHER JOHNSON
SCOTT H. SWAN
White & Wood, P.C.
300 West Main Street
Richmond, Virginia 23220
*Counsel for Petitioner*

*Of Counsel*
NEAL P. RUTLEDGE
Suite 602
1211 Connecticut
Avenue, N.W.
Washington, D.C. 20036

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### Cases



### Other Authorities

In The

# Supreme Court of the United States

October Term, 1978

---

NO. 78-1595

---

GEORGE CALVIN LEWIS, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

---

## BRIEF FOR THE PETITIONER

---

### OPINION BELOW

The opinion of the Court of Appeals is reported in *United States of America* v. *George Calvin Lewis, Jr.*, 591 F.2d 978 (4th Cir. 1979), and is reproduced in the Appendix. The Fourth Circuit's unreported order denying rehearing is in the appendix at App. 13.

### JURISDICTION

The Fourth Circuit decided Lewis's appeal on January 24, 1979, and judgment was entered that date. A petition

for rehearing and motion for stay of mandate were timely filed. On March 19, 1979, rehearing was denied, and the Court stayed the issuance of mandate for 30 days to permit filing for a petition for certiorari. The petition was filed on April 18, 1979, and certiorari was granted on June 18, 1979. Jurisdiction to review the decision of the Court of Appeals is conferred by 28 U.S.C. § 1254.

## QUESTION

The question presented is whether a conviction in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), may be used to support a subsequent conviction under Title 18 U.S.C. App. § 1202(a)(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, treaties, statutes, ordinances, or regulations involved are:

(A) The Constitution of the United States of America, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

(B) Title 18 U.S.C. App. §1202 (a)(1): "Any person who—(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000, or imprisoned for not more than two years, or both."



## STATEMENT OF THE CASE

George Calvin Lewis, Jr. was tried in the United States District Court for the Eastern District of Virginia on December 22, 1977. The two-count indictment charged Lewis with receipt of a firearm having previously been convicted of a felony, in violation of Title 18 U.S.C. § 922(h)(1), and receipt and possession of a firearm having previously been convicted of a felony in violation of Title 18 U.S.C. App. § 1202(a)(1).

On the day of the non-jury trial, counsel for Lewis, in a request for a continuance, told the District judge that the prior convictions relied on by the government were convictions obtained in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Counsel stated that Lewis had been charged with the same offense as Gideon (breaking and entering with intent to commit a misdemeanor), and was tried in the same state (Florida) about six months before Gideon was tried. Counsel told the District judge that he had called an attorney in Florida who checked the Court records on Lewis's convictions, and that these records showed affirmatively that Lewis had no lawyer. Counsel then made a proffer of indigency. (App. 2).

The District Court ruled that the invalidity of the convictions was immaterial. Accordingly, no proof of the *Gideon* violation was presented. (App. 9). Lewis was acquitted on the charge under 18 U.S.C. § 922(h)(1), but was convicted under 18 U.S.C. App. § 1202(a)(1). A panel of The United States Court of Appeals for the Fourth Circuit affirmed the conviction, with one judge dissenting.

## SUMMARY OF ARGUMENT

*Gideon* v. *Wainwright*, 372 U.S. 335 (1963) established the right of indigent defendants in state felony prosecutions

to legal representation. In cases following *Gideon,* this Court has forbidden the use of uncounselled felony convictions for enhanced punishment under recidivist statutes, impeachment and in the sentencing process.

In this case, a prosecution under 18 U.S.C. App. § 1202 (a)(1), for possession of a firearm by a convicted felon, counsel for petitioner represented to the District Court, in a request for a continuance, that the records of the state proceeding showed affirmatively Lewis had no lawyer. The Court denied the motion, ruling that it was immaterial whether Lewis had a lawyer in the prior, underlying proceeding.

There is no evidence that Congress intended Section 1202(a)(1) to embrace persons of Lewis's status, i.e. convicted of felonies in violation of *Gideon, supra.* Further, the statute should be read to avoid a construction that would render it unconstitutional. *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973).

In any event, the use by the government in this case of prior uncounselled convictions to support a finding of a violation of Title 18 U.S.C. App. § 1202(a)(1) was constitutionally impermissible and denied Lewis again the protection of the Sixth Amendment. Lewis's conviction and its affirmance by a divided Court of Appeals represent a retreat from the principles of *Gideon, supra; Burgett* v. *Texas,* 389 U.S. 109 (1967); *United States* v. *Tucker,* 404 U.S. 443 (1972), and *Loper* v. *Beto,* 405 U.S. 473 (1972).



## ARGUMENT

In *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), this Court held unanimously that indigent defendants in state felony prosecutions have the right to court-appointed counsel. In the sixteen years since then, this Court has remained steadfast to that principle.

In *Burgett* v. *Texas,* 389 U.S. 109 (1967), the Court held impermissible the use of a prior conviction obtained in violation of *Gideon* in a prosecution under a recidivist statute. "Worse yet," the Court said, "since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115.

In *United States* v. *Tucker,* 404 U.S. 443 (1972), the Court held that uncounselled convictions could not be considered in sentencing. Lastly, in *Loper* v. *Beto,* 405 U.S. 473 (1972), it was held that the use of a prior uncounselled conviction to impeach a defendant violated his constitutional safeguards. Such convictions, this Court said, "lacked reliability." 405 U.S. at 484.

The holding of the Court of Appeals presents this strange situation: When Lewis took the witness stand, his prior convictions obtained in violation of *Gideon* could not be used to impeach his testimony, nor could the Court, after finding guilt, consider the prior convictions in imposing a penalty. Yet, the very same convictions formed the basis for guilt. Such a result, we suggest, does not make sense.

The panel majority stated Congress's intent in enacting Section 1202(a)(1), "as the legislative history as well as the statutory language itself makes clear, is that any person within this status class of a convicted felon, whose conviction was not facially invalid and whose conviction had 'not been invalidated as of the time the firearm is possessed' is subject to the statutory prohibition . . ." (App. 15). Rely-

ing on its earlier holding in *United States* v. *Allen,* 556 F.2d 720 (4th Cir. 1977), which was a prosecution under 18 U.S.C. § 922(a)(6) for falsification in the acquisition of a firearm, the majority concluded that *Burgett, supra,* should not be read "so broadly" as to prohibit prosecution in Lewis's case. (App. 18).

However, no such Congressional intent can be inferred. As this Court observed in *United States* v. *Bass,* 404 U.S. 336, 344 (1971):

> Title VII was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report.

See also, *United States* v. *Batchelder,* 442 U.S. . . . (1979). As Judge Winter stated in his dissenting opinion (App. 22),

> It is therefore doubtful that Congress gave full consideration either way to the matter of the constitutional validity of the prior felony conviction. * * * In any event, it is axiomatic that a statute should be read, if possible, to avoid a construction that would render it unconstitutional. See, e.g., United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Vuitch, 402 U.S. 62, 70 (1971). In my view, the majority's construction of §1202(a) runs afoul of that rule.

The opinion by the majority conceded two things. First, it indicated that if Lewis's convictions were "facially" invalid, Lewis could not be convicted under Section 1201 (a)(1). Secondly, it suggested that had Lewis had his conviction invalidated there could be no prosecution. (App. 20).

We respectfully submit that "facial invalidity" is a standard of no value in determining whether a defendant is to



be accorded the protection of *Gideon* and subsequent cases. Either Lewis had a lawyer or he did not. The fact that the government's proof recites the absence or presence of counsel, or, as here, is silent on that score, does not make the government's case any stronger or the use of such a conviction any less foul.[1]

It would have been simple to have the Florida court records produced, as counsel for Lewis suggested. At no time has the government suggested that Lewis had a lawyer at his Florida trial. In fact, Lewis was convicted in the same state as Gideon several months before Gideon was convicted. We believe, too, that it is important that the constitutional defect alleged was a pure violation of *Gideon,* and not an impediment like ineffective assistance of counsel, unreasonable search, denial of speedy trial, or the like. More than fifteen years have passed since this Court's decision in *Gideon,* and granting Lewis the protection he seeks here will hardly burden the judicial process by requiring a multitude of "mini-trials."

Furthermore, as Judge Winter pointed out in his dissent, "I do not understand, as the majority asserts, that defendant concedes the 'facial' validity of his earlier conviction. He asserts that the record of that conviction shows that he was unrepresented by counsel and that the conviction is void on it face." (App. 21). Counsel, indeed, had informed the District Court as follows. (App. 2):

> I called a lawyer in Florida by the name of Harper who is in Clearwater where this case was tried. Mr. Harper

[1] In Lewis's Petition for Certiorari, on Page 4, we stated that the government's proof on the prior conviction consisted of a prison record, not the court records. This statement is incorrect. The government introduced properly attested copies of orders of the Florida Court. (Appendix 10). These orders do not mention the presence of an attorney, however, and counsel for Lewis represented that the full record showed positively Lewis had no attorney.

went to the Court, to the records of the county or circuit court where this gentleman was tried. He gave me the following information:

Number one, the record affirmatively shows that he was not represented. It is not a silent record. It affirmatively shows no lawyer.

He was asked by the trial judge on the date of trial, "Do you have a lawyer?" His response was, "No, I do not." We would proffer evidence that he was in fact indigent at that time. The judge proceeded to try him on that day. He ordered a pre-sentence investigation of some nature or another. Continued sentencing.

The government's proof of the convictions are the orders on the day of sentencing. (App. 10). We submit that to label these convictions "facially valid" and thus allege some kind of distinction is to play word games with a fundamental constitutional guarantee.

As stated earlier, the panel majority implied that had Lewis, prior to possessing the firearm, had his conviction set aside, then he could not have been prosecuted under Section 1202(a)(1). We agree, but we hardly see how the formality of expungement should be of any consequence. Again, either Lewis had a lawyer or he did not.

The Circuits are divided on whether a defendant in a prosecution for receipt, transportation, or possession of a firearm in violation of 18 U.S.C. 922(g)(1), 922(h)(1) or App. 1202(a)(1) may assert as a defense the unconstitutionality of an underlying conviction. (See the cases collected in Footnote 10 of the majority opinion below, (App. 19). But the Fourth Circuit is the first Circuit to hold that such a defense is not available when the constitutional impediment is denial of any representation. In *United States* v. *Lufman*, 457 F.2d 165 (7th Cir. 1972), and *United States* v. *Thoreson*, 428 F.2d 654 (9th Cir. 1970)



courts have correctly held that convictions in violation of *Gideon, supra,* may not underlie prosecutions of this type.

The reliance of the Fourth Circuit on its earlier decision in *United States* v. *Allen,* 556 F.2d 720 (4th Cir. 1977) is misplaced. *Allen* involved a prosecution for falsification in the purchase of a firearm under 18 U.S.C. § 922(a)(6). Assuming *Allen* was correctly decided, the Fourth Circuit emphasized that Section 922(a)(6) did "not penalize Allen for his possibly invalid prior conviction, but for lying about them. . ." (p. 724).

We respectfully submit that the decision below is a retreat from *Gideon, supra* and *Burgett, supra*. Like Burgett, Lewis's "right to counsel, a 'specific federal right,' is being denied anew. This Court cannot permit such a result unless *Gideon* v. *Wainwright* is to suffer serious erosion." *Burgett, supra,* at 325.

## CONCLUSION

For the foregoing reasons the petitioner respectfully requests that the judgment of The Court of Appeals for the Fourth Circuit be reversed.

/s/ ANDREW W. WOOD
*Counsel for* GEORGE CALVIN LEWIS, JR.

ANDREW W. WOOD
J. HATCHER JOHNSON
SCOTT H. SWAN
White & Wood, P. C.
300 West Main Street
Richmond, Virginia 23220

## CERTIFICATE

I certify that three copies of this Brief were mailed first class, postage prepaid, to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

ANDREW W. WOOD

No. 78-1595

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

GEORGE CALVIN LEWIS, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

ANDREW J. LEVANDER
*Assistant to the Solicitor General*

JEROME M. FEIT
JOEL M. GERSHOWITZ
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

# INDEX

Argument—Continued



CITATIONS

Cases:





Cases—Continued

Cases—Continued





Cases—Continued

Cases—Continued



Constitutions, statutes and regulation:





Constitutions, statutes and regulation—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

No. 78-1595

GEORGE CALVIN LEWIS, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

### OPINION BELOW

The opinion of the court of appeals (A. 13-27) is reported at 591 F.2d 978.

### JURISDICTION

The judgment of the court of appeals (A. 28) was entered on January 24, 1979. A petition for rehearing was denied on March 19, 1979 (A. 29). The petition for a writ of certiorari was filed on April 18, 1979, and was granted on June 18, 1979 (A. 30). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a defendant who is a previously convicted felon may challenge the constitutionality of his prior conviction as a defense to a prosecution for unlawfully possessing a firearm.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

3. 18 U.S.C. 925(c) provides in pertinent part:

> A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the



> conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. * * *

4. 18 U.S.C. App. 1202(a) provides:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions, or
>
> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

5. 18 U.S.C. App. 1203 provides:

> This title shall not apply to—
>
> (1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and
>
> (2) any person who has been pardoned by the President of the United States or

the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

## STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner, who had previously been convicted of a felony, was convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner was sentenced to a term of 18 months' imprisonment. A divided panel of the court of appeals affirmed (A. 13-27).

1. The undisputed evidence at trial showed that on January 28, 1977, Henrico County (Virginia) police officers were keeping surveillance over a suspected illegal gambling casino. At approximately 9:30 p.m., the officers observed petitioner and another male drive around the surveillance area in a suspicious fashion. After parking the car, petitioner and his companion stood beside the car drinking beer. Petitioner then took a pistol out of the car, concealed it in the waistband of his trousers, and began walking toward the gaming establishment. Because carrying a concealed weapon is a crime in Virginia, the officers stopped petitioner, removed a .32 caliber revolver from his waistband holster, and arrested him (Gov't Exh. 1; Tr. 5-8, 18-19, 25-26, 29-30, 35).

Petitioner stipulated to the fact that the firearm in question had previously been shipped in interstate commerce (Gov't. Exh. 7; Tr. 36). In addition, the



government introduced a certified copy of petitioner's 1961 felony conviction in Florida state court for breaking and entering with intent to commit a misdemeanor (Gov't. Exh. 4; Tr. 21-24). That conviction has never been overturned, and petitioner had not obtained a pardon or permission from the Secretary of the Treasury to possess firearms. See 18 U.S.C. App. 1203(2); 18 U.S.C. 925(c).

Shortly before trial, petitioner's counsel advised the court that he had information that petitioner had not been represented by counsel in his 1961 Florida trial. He contended that a conviction for violation of Section 1202(a)(1) could not be predicated on a prior conviction obtained in violation of petitioner's Sixth Amendment rights (A. 2-9).[1] The district court rejected this claim, ruling that the constitutionality of the Florida conviction was immaterial with regard to petitioner's status as a previously convicted felon for purposes of Section 1202(a)(1) (A. 9). Accordingly, petitioner did not present any evidence on whether in fact he had been convicted in 1961 without the aid of counsel.

2. On appeal, the court of appeals held that the accused may not collaterally attack a prior conviction as a defense to a prosecution under Section 1202(a)(1). The court concluded that the language and legislative history of Section 1202(a)(1) make clear

---

[1] Petitioner's counsel further suggested that the Florida indictment under which petitioner had been tried was facially defective and that although petitioner was a juvenile (17 years old) at that time, he had been tried as an adult (A. 3-4).

that the statutory prohibition applies to all persons who have been convicted of a felony regardless of whether that conviction is subject to collateral attack (A. 14-18).[2] The court also rejected petitioner's contention that use of petitioner's prior uncounselled conviction as the predicate for a Section 1202(a)(1) prosecution would violate his Sixth Amendment right to counsel. Quoting from its earlier opinion in *United States* v. *Allen*, 556 F.2d 720, 723-724 (4th Cir. 1977),[3] the court observed (A. 18-19):

> Although *Burgett* [v. *Texas*, 389 U.S. 109 (1967); *United States* v.] *Tucker*, [404 U.S. 443 (1972);] and *Loper* [v. *Beto*, 405 U.S. 473 (1972),] established that a conviction in violation of the right to counsel is too unreliable to show guilt or enhance punishment under a recidivist statute, to form the basis for an increased sentence, or to be used to impeach general credibility, they do not say that a conviction in violation of *Gideon* [v. *Wainwright*, 372 U.S. 335 (1963)] is absolutely meaningless. The reliability of an indictment as an indication of probable cause to believe that a certain person has committed a crime does not depend on the presence of defense counsel * * *. Nor does the

[2] The court suggested that an exception might be appropriate where the conviction was facially invalid (A. 15).

[3] Although *Allen* involved a prosecution under 18 U.S.C. 922(a)(6) for making a false statement to a dealer in connection with the acquisition of a firearm, the court in the present case stated that "the quoted reasoning is equally applicable to either type of prosecution and has been generally so construed" (A. 17 n.7).



> absence of defense counsel or the lack of a waiver of the assistance of counsel render a prior felony conviction invalid or unreliable as an indication that the public interest requires that the convicted person's access to firearms be restricted when the conviction has not been reversed or vacated and the defendant remains unpardoned. We think that Congress is entitled to rely on a prior standing conviction as proof that there is probable cause to believe the convicted person has been involved in criminal activity and should not be able to buy a gun without first showing that he is no threat to public safety, even though the conviction may have been obtained in violation of *Gideon*.

Judge Winter dissented (A. 21-27). In his view, *Burgett* v. *Texas*, 389 U.S. 109 (1967), and its progeny bar the government from relying on petitioner's prior unconstitutional conviction as the basis for any prosecution (A. 23-24). Accordingly, Judge Winter concluded that Section 1202(a)(1) should be construed to permit collateral attacks based on the deprivation of the right to counsel in order to avoid rendering the statute unconstitutional (A. 21-23).

## SUMMARY OF ARGUMENT

The federal gun laws broadly prohibit persons who have been convicted of felonies from obtaining firearms. See 18 U.S.C. App. 1202(a)(1); 18 U.S.C. 922(d)(1), 922(g)(1), and 922(h)(1). Petitioner was convicted in Florida state courts of a felony in 1961. That conviction has never been overturned, and petitioner has never obtained a pardon (see 18

U.S.C. App. 1203(2)) nor received permission from the Secretary of the Treasury to possess a firearm (see 18 U.S.C. 925(c)). Petitioner nonetheless argues that his possession of a firearm in 1977 was lawful if his prior conviction was invalid under this Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). The courts below, however, correctly concluded that the alleged invalidity of a prior conviction is not a defense to a prosecution under Section 1202(a)(1), either as a matter of statutory construction or constitutional compulsion.

I

Section 1202(a)(1) unequivocally provides that "[a]ny person who * * * has been convicted * * * of a felony * * * [may not] receive[], possess[], or transport[] * * * any firearm * * *." No exception for persons whose outstanding convictions are allegedly invalid appears either in the sweeping language of the statute or in the express enumeration of exceptions contained in Section 1203. That omission is particularly indicative of congressional intent, since Congress has elsewhere specifically provided that the defendant may challenge the validity of his prior conviction in the course of a subsequent criminal case, when it has thought it appropriate to allow such a defense. See 18 U.S.C. 3575(e); 21 U.S.C. 851(c)(2). Accordingly, as nearly every court of appeals has recognized, Section 1202(a)(1) imposes a firearm disability upon the fact of conviction regardless of its validity. Thus, a convicted felon who wishes to possess a firearm lawfully must first have his con-



viction overturned (or otherwise obtain relief in accordance with the statute); he cannot simply ignore the fact of his conviction as petitioner did.

The legislative history and the purpose of Section 1202(a)(1) show that an allegedly invalid conviction may serve as the predicate for a prosecution under that provision. Senator Long, who introduced and sponsored Section 1202(a)(1) as a last minute floor amendment to the Omnibus Crime Control and Safe Streets Act of 1968, repeatedly emphasized the sweeping nature of his provision and stated that his bill would ensure that "the fact that anybody * * * has been convicted of a felony" would result in a firearm disability. 114 Cong. Rec. 13868 (1968). In addition, the legislative history as a whole demonstrates a strong congressional intent to stop the flow of firearms to any person with a criminal record or other objective characteristic that might indicate a propensity to misuse firearms. That purpose would be defeated if Section 1202(a) is construed to permit otherwise disabled persons to attack the validity of their disabling characteristic (such as a conviction, dishonorable discharge, or commitment to a mental institution) *after* such persons have obtained a firearm rather than before, as contemplated by Congress. See 18 U.S.C. 925(c); 18 U.S.C. App. 1203(2).

That Section 1202(a)(1) applies to all felons regardless of the validity of their prior conviction is further evidenced by the structure of the entire Omnibus Act. Like Section 1202(a)(1), Sections 922(g)(1) and 922(h)(1) impose a firearm disability on all con-

victed felons. In addition, those provisions also prohibit any person from receiving or transporting a firearm while under indictment for a felony, even if that person is subsequently acquitted or the indictment is dismissed. It is thus readily apparent that Congress could not have "intended to impose no disability on persons with outstanding convictions that they assert are unconstitutional, but to impose a disability on persons under indictment," particularly since in most instances a person whose conviction is overturned would still be under indictment. *United States* v. *Graves*, 554 F.2d 65, 72 (3d Cir. 1977) (en banc). Thus, the construction for which petitioner contends would produce an irrational result at war with the basic objectives of the Act.

Moreover, petitioner's construction of Section 1202(a)(1) would substantially undermine the effectiveness and purpose of various other regulatory provisions in the Omnibus Act. For example, the logic of petitioner's position suggests that a felon who believed his conviction to be invalid could lawfully lie about the fact of his conviction to a firearm dealer in connection with the acquisition of a firearm—clearly not a result intended by Congress. See 18 U.S.C. 922(a)(6), 922(d)(1). Furthermore, permitting a defendant to attack his prior conviction collaterally as a defense to a federal firearm prosecution would tend to encourage circumvention of the administrative preclearance scheme established by Congress in Section 925(c).



In sum, the language, legislative history, and structure of the Omnibus Act unambiguously demonstrate that an allegedly invalid prior conviction may be used as the basis for a firearm prosecution. Accordingly, there is no "fairly possible" construction of Section 1202(a)(1) that avoids the constitutional question raised by petitioner. See, *e.g.*, *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977). Similarly, in the absence of any grievous ambiguity in the statutory language, there is no occasion to apply the rule of lenity. See, *e.g.*, *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7.

## II

The court of appeals also correctly rejected petitioner's constitutional challenge to his conviction. We note at the outset that although this is a criminal case, what is really at issue here is the constitutional power of Congress to impose a *civil* firearms disability as a consequence of any felony conviction, even if the defendant has been denied the right to representation by counsel at his felony trial. Criminal consequences attach only when the defendant has eschewed the various legal remedies available to remove the disability and has flouted the statutory prohibition. If the civil disability is valid, then it cannot reasonably be maintained that Congress may not employ criminal sanctions to punish disobedience thereof.

The firearm regulatory scheme at issue here unquestionably bears a rational relationship to the legitimate governmental interest in public safety.. The

express findings in Section 1201 and the legislative history reflect Congress' awareness of the substantial nexus between the rise in violent crime and the easy availability of guns to "criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner." 114 Cong. Rec. 16298 (1968) (remarks of Rep. Pollock). Thus, just as Congress constitutionally imposed a firearm disability upon the fact of indictment, dishonorable discharge, or commitment to an institution, so too Congress could impose a disability on the fact of conviction. Certainly, an uncounselled conviction is no less reliable an indicator of a person's potential danger to society than an indictment, and the availability of judicial relief from the conviction or administrative relief pursuant to Section 925(c) eliminates the possibility of unfairness in particular cases.

Nothing in the Sixth Amendment bars use of an uncounselled conviction as the predicate for imposition of a firearm disability, enforcible by criminal penalties. To be sure, an uncounselled felony conviction may not be reliably used to enhance a subsequent sentence (see *Burgett* v. *Texas*, 389 U.S. 109 (1967); *United States* v. *Tucker*, 404 U.S. 443 (1972)) or to impeach a defendant's credibility (see *Loper* v. *Beto*, 405 U.S. 473 (1972)). But the reliability of the individual conviction is irrelevant to a Section 1202(a)(1) prosecution, and the Court has refused to hold that an uncounselled conviction is invalid for all purposes. See, *e.g.*, *Scott* v. *Illinois*, No. 77-1177



(Mar. 5, 1979). To the contrary, the Court has clearly indicated that a convicted felon may not simply ignore or lie about the fact of his prior conviction—precisely what petitioner is attempting to do here. See *Loper* v. *Beto*, *supra*, 405 U.S. at 482 n.11.

Moreover, in *Burgett* and its progeny the prior conviction did not become relevant until the time of the second trial. Accordingly, the Court allowed the defendant to challenge the validity of his conviction at that time. The *Burgett* line of cases is thus not controlling here, since the federal firearms laws impose a disability immediately upon the event of conviction. Accordingly, the court of appeals properly concluded that a felon who wants to possess a firearm lawfully must challenge the validity of his conviction or obtain a pardon or administrative relief prior to acquiring the firearm.

## ARGUMENT

The federal gun laws prohibit persons who have previously been convicted of a felony from receiving, possessing or transporting firearms. See 18 U.S.C. 922(g)(1), 922(h)(1), and App. 1202(a)(1); *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 3 5. This case presents the question whether a defendant may challenge the validity of his prior felony conviction as a defense to a prosecution for unlawfully possessing a firearm in violation of Section 1202(a)(1).[4]

[4] There appears to be no significant difference among Sections 922(g)(1), 922(h)(1), and 1202(a)(1) with regard to

As we demonstrate below, the language, legislative history, and purpose of Section 1202(a)(1) compel the conclusion that Congress intended to keep firearms out of the hands of every person who has been convicted of a felony regardless of the validity of that conviction, until such time as the felon either successfully overturns his conviction, obtains a qualifying pardon, or receives administrative relief from the Secretary of the Treasury (see 18 U.S.C. 925 (c); App. 1203(2)). Petitioner pursued none of these remedies and cannot now collaterally attack his prior felony conviction.

Furthermore, application of Section 1202(a)(1) to persons whose prior convictions were allegedly obtained without the aid of an attorney does not violate the Constitution. As petitioner apparently concedes, Congress' decision to impose a firearm dis-

---

the issue posed by this case. These provisions were simultaneously enacted by Congress in separate titles of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 225-235, 236-237, as modified by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213-1226, 1236. Section 1202(a)(1) differs substantially in scope from Sections 922(g)(1) and (h)(1) (see *United States* v. *Batchelder, supra*, slip op. 3-6 & n.7), but the pertinent language of the three provisions is virtually identical insofar as each section imposes a firearm disability on any individual who has been convicted of a crime punishable by imprisonment for a term exceeding one year. See 18 U.S.C. 921(a)(20), 922(g)(1), 922(h)(1), App. 1202(a)(1) and App. 1202(c)(2). (Section 921(a)(20) exempts antitrust violators and the like, whereas Section 1202 does not). Accordingly the decision of the Court in this case will likely resolve the issue presented here for purposes of all three statutes.



ability on all felons without regard to the constitutionality of the predicate conviction constitutes a rational classification that does not violate the Fifth Amendment. Moreover, the Sixth Amendment right to counsel does not bar recognition of the fact of an uncounselled conviction in this context.

## I. SECTION 1202(a)(1) PROHIBITS A FELON FROM POSSESSING A FIREARM EVEN IF THE PREDICATE FELONY IS OTHERWISE SUBJECT TO COLLATERAL ATTACK

### A. The Language, Legislative History, And Purpose Of Section 1202(a)(1) Demonstrate That The Alleged Invalidity Of The Prior Conviction Is Not A Defense To A Prosecution Under That Provision

1. As this Court has repeatedly observed, the "starting point in every case involving the construction of a statute is the language itself." *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 6 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); see, *e.g.*, *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 7; *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 3-4. Section 1202(a)(1) unambiguously declares that "[a]ny person who * * * has been convicted by a court of the United States or of a State * * * of a felony * * *" may not receive, possess, or transport a firearm that has traveled in or affected commerce. Since no modifier restricts the scope of the term "convicted," "[n]othing on the face of the statute suggests a congressional intent

to limit its coverage to persons [whose convictions are not subject to collateral attack]." See *United States* v. *Culbert*, 435 U.S. 371, 373 (1978); see also *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 3.[5] Rather, as the courts of appeals have almost uniformly recognized, the plain meaning of this sweeping statutory language is that the fact of conviction imposes a firearm disability on all felons until such time as their convictions are overturned or they are relieved of the disability by other affirmative action (A. 14-17). See, *e.g.*, *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978) (construing Section 922(h)(1)); *United States* v. *Maggard*, 573 F.2d 926, 928 (6th Cir. 1978); *United States* v. *Graves*, 554 F.2d 65, 69 (3d Cir. 1977) (en banc); *United States* v. *Samson*, 533 F.2d 721, 722 (1st Cir.), *cert. denied*, 429 U.S. 845 (1976); *United States* v. *Williams*, 484 F.2d 428 (8th Cir. 1973); *United States* v. *Liles*, 432 F.2d 18, 20-21 (9th Cir. 1970). See also *Barrett* v. *United States*, 423 U.S. 212, 218 (1976). But see *Dameron* v. *United States*, 488 F.2d 724, 727 (5th Cir. 1974).[6]

[5] The thrust of petitioner's argument in this Court is only that uncounselled convictions may not serve as the predicate felony conviction under Section 1202(a)(1). In the district court, however, petitioner attempted to impeach his prior conviction on various grounds. See note 2, *supra*. As a matter of statutory language, if Section 1202 permits collateral attacks on the predicate felony on the ground of lack of counsel, it would permit such attack on any other ground that would support relief under 28 U.S.C. 2254 or 2255.

[6] Section 1201, which contains Congress' express findings and declarations on the problem of firearm abuse by "felons" and other irresponsible persons, also reflects an expansive legislative approach.



Moreover, the express enumeration of exceptions to Section 1202(a)(1) found in Section 1203 refutes the proposition that the alleged invalidity of the predicate felony conviction is a defense to a Section 1202(a)(1) prosecution. Section 1203 exempts certain limited categories of "convicted" felons from the broad coverage of Section 1202(a)(1), including persons who have received a qualifying pardon. 18 U.S.C. App. 1203(2).[7] No exception is made, however, for persons whose outstanding convictions are for any reason invalid. In accordance with the ancient maxim of *expressio unius est exclusio alterius*, judicial creation of another exception is therefore unwarranted. See, *e.g.*, *Huddleston* v. *United States*, 415 U.S. 814, 822 (1974); *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Ford* v. *United States*, 273 U.S. 593, 611 (1927); *Hyland* v. *Fukuda*, 580 F.2d 977, 980 (9th Cir. 1978). In our view, this particular omission is especially indicative of congressional intent, since other federal statutes involving prior convictions explicitly permit the accused to challenge the validity or constitutionality of the predicate felony as a defense. See Section 411

[7] The pardon must specify that the felon may possess firearms. Section 1203 also immunizes prison inmates who have been authorized to carry a gun by a prison official. 18 U.S.C. App. 1203(1). In addition, Congress precisely defined "felony" to exclude certain state crimes punishable by no more than two years imprisonment. 18 U.S.C. App. 1202(c)(2).

(c)(2) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 851(c)(2) (recidivist statute); 18 U.S.C. 3575(e) (special dangerous offender statute).[8]

2. Section 1202 was enacted as part of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 236-237 ("Omnibus Act").[9] Because Title VII was added as a last-minute floor amendment to the Omnibus Act, it is not discussed in the legislative reports. See *United States* v. *Batchelder*, *supra*, slip op. 5; *Scarborough* v. *United States*, 431 U.S. 563, 569-570 & n.9 (1977); *United States* v. *Bass*, 404 U.S. 336, 344 & n.11 (1971). Nothing in the legislative debates regarding Title VII even faintly suggests, however, that Congress intended to permit a felon accused of violating Section 1202(a)(1) to raise the alleged invalidity of his prior conviction as a defense. (The extensive legislative history accompanying Sections 922(g)(1) and 922(h)(1) is similarly bereft of any support

---

[8] 18 U.S.C. 3575(e) was enacted as part of Title X of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 82 Stat. 949. Title XI of that same statute concerns explosives. Like Sections 922(g)(1) and 922(h)(1) from which it is derived, Title XI unambiguously prohibits any person under indictment for or convicted of a felony to ship or transport an explosive. See 84 Stat. 955, 18 U.S.C. 842(i).

[9] Title VII was meant to "complement" and "add to" the more comprehensive gun legislation contained in Title IV of the Omnibus Act. 114 Cong. Rec. 14774, 16286 (1968); see *United States* v. *Batchelder*, *supra*, slip op. 5-6; *Scarborough* v. *United States*, 431 U.S. 563, 573 (1977). See pages 24-32, *infra*.



for petitioner's position.) To the contrary, whatever relevant legislative history there is reflects a congressional intent to impose a firearm disability on all felons based on the fact of conviction.

For example, Senator Long, who introduced and managed passage of Title VII, observed that under his bill "the fact that anybody * * * has been convicted of a felony" would thereafter preclude that person from possessing a firearm. 114 Cong. Rec. 13868 (1968). As Senator Long further explained on several occasions:

> When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them.
>
> * * * * *
>
> What [Title VII] seeks to do is to make it unlawful for a firearm * * * to be in the possession of a convicted felon who has not been pardoned and who has therefore lost his right to possess firearms. * * *
>
> * * * * *
>
> So, under Title VII, every citizen could possess a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny every assassin, murderer, thief and burglar of the right to possess a firearm in the future except where he has been pardoned by the President or a State Governor and has been

expressly authorized by his pardon to possess a firearm.

*Id.* at 13868, 14773. See also *id.* at 13869, 14774. These remarks evince Congress' understanding that the incidence of conviction automatically and without exception results in the forfeiture of the right to possess firearms.[10]

We further note that petitioner's cramped construction of Section 1202(a)(1) seems squarely inconsistent with the general thrust of the legislative policy revealed by the history of Title VII. That statute (as well as Title IV of the Omnibus Act) was enacted in response to the precipitous rise in political assassinations, riots and other violent crimes involving guns that occurred in this country in the 1960's. See, *e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess. 76-78 (1968); H.R. Rep. No. 1577, 90th Cong.,

[10] Senator Long was, of course, the sponsor and floor manager of the bill and his statements are entitled to particular weight. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 13 (1978). Moreover, his broad view of the purpose and effect of Section 1202(a) is reflected in the comments and questions of other congressmen. See, *e.g.*, 114 Cong. Rec. 14774 (1968) (exchange of Sens. Long and McClellan); *id.* at 16286 (Rep. Machen); *id.* at 16293 (Rep. Boland); *id.* at 16296 (Rep. Randall) (noting that the provision might work a hardship as to dishonorably discharged veterans (Section 1202(a)(2)) since they might have rehabilitated themselves but not yet have obtained a pardon). See also *id.* at 21788 (Rep. Casey) (observing that with regard to 18 U.S.C. 924(c) "the only thing that would have to be proved [is] his conviction * * * and that a gun was used that had been in interstate commerce"); *id.* at 13220 (remarks of Sen. Tydings) ("any person who has a criminal record").



2d Sess. 7 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess. 22-23 (1968); 114 Cong. Rec. 13868-13869, 14773-14774, 16285-16296 (1968). Given this historical context, it is not surprising that Congress took an expansive approach to keeping firearms away from "criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner." *Id.* at 16298 (Rep. Pollock).[11] As this Court concluded in *Scarborough* v. *United States*, *supra*, 431 U.S. at 572, "[t]he legislative history [of Title VII] in its entirety, while brief, further supports the view that Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" Concomitantly, the legislative debates are completely devoid of any suggestion that Congress intended to permit the accused to raise belatedly the validity of his prior conviction as a defense to possessing a gun while still a "convicted" felon. In these circumstances, there is no basis for creating a loophole in the broad statutory scheme enacted by Congress. See *United States* v. *Naftalin*, *supra*, slip op. 8; *Huddleston* v. *United States*, *supra*, 415 U.S. at 825.

3. In addition, limiting the application of Section 1202(a)(1) to validly convicted felons would

[11] Senator Long similarly observed that Title VII applies to "persons who, by their actions, have demonstrated that they are dangerous, *or that they may become dangerous.*" 114 Cong. Rec. 14773 (1968) (emphasis supplied).

"bring about an end completely at variance with the purpose of the statute." *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953); *United Steelworkers* v. *Weber*, No. 78-432 (June 27, 1979), slip op. 6. As evidenced by the language and legislative history of Section 1202(a)(1) detailed above, Congress sought to control the incidence of violent crime by "maximiz[ing] the possibility of keeping firearms out of the hands of [potentially irresponsible] persons." 114 Cong. Rec. 21784 (1968) (remarks of Rep. Celler). See, *e.g.*, *id.* at 16298; *Hyland* v. *Fukuda*, *supra*, 580 F.2d at 980; *United States* v. *Graves*, *supra*, 554 F.2d at 74; *United States* v. *Liles*, *supra*, 432 F.2d at 20. Congress not only prohibited any person who has been convicted of a felony from possessing a firearm, but it also imposed a similar disability on any person who has been dishonorably discharged from the army,[12] who has been adjudged a mental incompetent,[13] who has renounced his citizenship,[14] or who is an unlawful alien.[15]

Thus, Congress enacted Section 1202(a) as a sweeping prophylaxis against misuse of firearms.

[12] See 18 U.S.C. App. 1202(a)(2).

[13] See 18 U.S.C. App. 1202(a)(3).

[14] See 18 U.S.C. App. 1202(a)(4). In promoting Title VII, Senator Long stated that Lee Harvey Oswald, President Kennedy's assassin, was both dishonorably discharged from the army (Section 1202(a)(2)) and an expatriate (Section 1202(a)(4)). See 114 Cong. Rec. 13868 (1968).

[15] See 18 U.S.C. App. 1202(a)(5).



See, *e.g.*, *United States* v. *Graves*, *supra*, 554 F.2d at 70. That purpose would be substantially undermined if, as petitioner contends, the various types of potentially dangerous people set forth in Section 1202(a) [16] could attack the validity of their disabling characteristic *after* the fact of possessing, receiving or transporting a firearm rather than before, as contemplated by Congress.[17] The effectiveness of the expansive regulatory scheme contained in Section 1202(a) depends in large measure on the breadth and certainty of the categories of disabled persons. Petitioner's construction of Section 1202(a)(1), however, would severely limit the prophylactic impact of Section 1202(a) in two ways. First, a person whose conviction (or discharge, etc.) was in fact invalid for any reason would not be prohibited from possessing a firearm, even though Congress reasonably "believed that a person with an outstanding felony conviction, even one that has been attacked as unconstitutional, may be somewhat more likely than the average citizen to utilize a gun improperly." *United States* v. *Graves*, *supra*, 554 F.2d at 70. Further, permitting a defendant to raise the validity of his disability at the trial of the firearms violation would tend to en-

[16] We are unable to discern any difference among the subsections of Section 1202(a) with regard to the statutory issue posed by this case. If petitioner is correct about the interpretation of Section 1202(a)(1), it seemingly follows that dishonorably discharged veterans and mental incompetents could also collaterally challenge the discharge or commitment as a defense to a prosecution under Section 1202(a).

[17] See pages 32-35, 44-45, *infra*.

courage convicted felons, who otherwise fall within the plain terms of the statute, to bypass the legal remedies available to remove the disability and to judge for themselves whether their prior convictions are possibly invalid and, consequently, whether they may possess a firearm.

### B. Examination Of The Complete Structure Of The Federal Gun Laws Demonstrates That An Invalid Felony Conviction May Serve As The Predicate For A Prosecution Under Section 1202(a)(1)

It is well settled that "courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions * * *." *United States* v. *Bass*, *supra*, 404 U.S. at 344. See, e.g., *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 11. The language, legislative history, and purpose of Title VII discussed above demonstrate that the invalidity of a prior felony conviction is not a defense to a prosecution under Section 1202(a)(1). The structure of Title IV of the Omnibus Act, which was enacted simultaneously with Title VII,[18] reinforces that conclusion.[19]

---

[18] See Pub. L. No. 90-351, 82 Stat. 225-235, 236-237.

[19] To be sure, the Court has previously indicated that it is not very meaningful to compare Title VII with Title IV in considering the interstate commerce nexus requirements of those statutes. See *Scarborough* v. *United States*, *supra*, 431 U.S. at 569. More recently, however, the Court has expressly recognized that in other contexts a comparison of the two titles may well illuminate the meaning and proper construction of these two overlapping gun control provisions. See



1. Like Title VII, Title IV prohibits various categories of presumptively dangerous persons from transporting and receiving firearms. 18 U.S.C. 922(g) and 922(h).[20] In particular Sections 922(g)(1) and 922(h)(1) impose a firearm disability on "any person * * * who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Thus, with regard to the statutory question at issue here, there is no significant difference between Title IV and Title VII. Both statutes seek to keep firearms away from "any person * * * who has been convicted * * *" of a felony.[21] Accordingly, if petitioner's con-

---

*United States* v. *Batchelder*, *supra*, slip op. 6 n.7. Application of the rule of *in pari materia* is particularly appropriate in this case, since the two titles were enacted together as complementary provisions, serve the same general function, and most important, contain virtually identical language with regard to the issue contested here. See, *e.g.*, *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-245 (1972); *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939).

[20] Title VII also prohibits mere possession. While the categories of disabled persons under the two statutes overlap, there are substantial differences. For example, only Title IV applies to "fugitive[s] from justice" and "addicts," whereas only Title VII covers dishonrable dischargees from the armed services, expatriates, and illegal aliens. Compare 18 U.S.C. 922(g)(2)-(3) and 922(h)(2)-(3) with 18 U.S.C. App. 1202(a)(2), 1202(a)(4), and 1202(a)(5). The differences and similarities between the two statutes have been canvassed in detail in the government's brief in *United States* v. *Batchelder*, at 15-22 (No. 78-776, 1978 Term), a copy of which has been sent to petiitoner.

[21] The definition of felony in Title IV is somewhat different, in reports not material here, from that contained in Title VII. Title IV exempts antitrust violations and the like

struction of Section 1202(a)(1) is correct, presumably an accused may also challenge the validity of his prior conviction under Sections 922(g)(1) and 922(h)(1).[22]

But it is immediately apparent that limiting the scope of Sections 922(g)(1) and (h)(1) to validly convicted felons is completely at odds with the statutory scheme as a whole. Sections 922(g)(1) and (h)(1) not only impose a disability on a convicted felon but also on a person who is under indictment for a felony, even if that person is subsequently acquitted of the felony charge. See, *e.g.*, *United States* v. *Pricepaul*, 540 F.2d 417, 421 (9th Cir. 1976); *DePugh* v. *United States* 393 F.2d 367 (8th Cir.), cert. denied, 393 U.S. 832 (1968); H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 30 (1968); S. Rep. No. 1097, 90th Cong., 2d Sess. 112 (1968); H.R. Rep. No. 1577, 90th Cong., 2d Sess. 11 (1968). See also 18 U.S.C. 925(b) (licensed gun dealer may continue to deal in guns despite Sections 922(g)(1) and (h)(1) "until any conviction pursuant to the indictment becomes final"); 18 U.S.C. 845 (b). Since Congress made the fact of indictment a disabling circumstance,

(18 U.S.C. 921(a)(20)) and Title IV covers felonies in any court (*i.e.*, possibly foreign ones), whereas Title VII specifically applies to federal and state courts.

[22] The Court's construction of Section 1202(a)(1) will also be dispositive of the proper application of Title XI of the Organized Crime Control Act of 1970, 18 U.S.C. 841 *et seq.*, which imposes a similar disability on convicted felons and indictees with regard to explosive materials. See 18 U.S.C. 842(i).



a fortiori the fact of conviction also deprives a person of the right to handle firearms. As the en banc Third Circuit concluded in *United States* v. *Graves*, *supra*, 554 F.2d at 72, "[t]o argue * * * that Congress intended to impose no disability on persons with outstanding convictions that they assert are unconstitutional, but to impose a disability on persons under indictment, would be to charge the legislative framers with a manifest inconsistency."

For example, except in the unusual circumstance that the defect in the conviction affects the validity of the indictment,[23] a person who successfully challenges his prior conviction will still be under indictment.[24] Holding that such a defendant may challenge his prior invalid conviction as a defense to the firearm prosecution would ascribe to Congress one of the following irrational purposes: Either the unconstitutionally convicted defendant is still guilty of violating Title IV because he is considered to have been under indictment at the time he received or transported a firearm—in which case the defense is a time-consuming illusion; or the defendant goes free because he was neither under indictment nor validly

[23] Thus, if a conviction is invalid because the indictment was fatally defective or because prosecution was improper on such grounds as double jeopardy or speedy trial, the indictment will be dismissed.

[24] Under federal practice and most state practices, including Florida, the defendant can be retried on the original indictment where, for instance, he was not represented by counsel.

convicted at the time in question—in which case persons who have lost the presumption of innocence as a result of an (invalid) conviction are rendered more trustworthy than persons under indictment who by definition are presumed innocent. Cf. *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 11-15; *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) (conviction "carries with it a presumption of regularity").[25]

2. Title IV constitutes a comprehensive gun control scheme that seeks "broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, *supra*, 423 U.S. at 218; see *Huddleston* v. *United States*, *supra*, 415 U.S. at 824. At the core of Title IV are various regulatory and licensing provisions. See 18 U.S.C. 922, 923. As we now demonstrate, petitioner's interpretation of Sections 922(g), 922(h), and 1202(a) would substantially limit the effectiveness of this regulatory scheme and thereby

[25] Both invalidly convicted felons and indictees may ultimately vindicate their innocence. But as between the two groups, it is beyond dispute that the latter, who are presumed innocent, are certainly not more presumptively dangerous than the former, who have been convicted, albeit invalidly. Thus, Congress could not rationally have imposed a disability on indictees until such time as they successfully defend themselves but not have imposed a similar disability on convicted felons until such time as they succeed in having their conviction reversed. Cf. *United States* v. *Naftalin*, *supra*, slip op. 5 ("There is, therefore, 'no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards.' ").



subvert the congressional purpose underlying Title IV.

Each person engaged in the business of importing, manufacturing, transporting, selling or otherwise dealing with firearms must procure a federal license. 18 U.S.C. 923, 922(a)-922(c). Federal licensees are obligated to keep detailed records of all their transactions. See 18 U.S.C. 922(b)(5), 922(c), 922(m), 923(g). In particular, every person who wishes to purchase a firearm from a dealer must fill out a special form that mandates disclosure of various information including disabling characteristics, such as a prior conviction or commitment to a mental institution. See, *e.g.*, *Huddleston* v. *United States*, *supra*, 415 U.S. at 816; *United States* v. *Allen*, 556 F.2d 720 (4th Cir. 1977); *United States* v. *Ransom*, 545 F.2d 481 (5th Cir.), cert. denied, 434 U.S. 908 (1977); *Cassity* v. *United States*, 521 F.2d 1320 (6th Cir. 1975).[26] It is a crime to make a false statement on

[26] Question 8 of Treasury Department (Bureau of Alcohol, Tobacco and Firearms) Form 4473 provides:

> 8. CERTIFICATION OF TRANSFEREE (*Buyer*)—An untruthful answer may subject you to criminal prosecution. Each question must be answered with a "yes" or a "no" inserted in the box at the right of the question.
>
> a. Are you under indictment or information* in any court for a crime punishable by imprisonment for a term exceeding one year? * *A formal accusation*

these forms (18 U.S.C. 922(a)(6)), and dealers are prohibited from transferring a firearm to anyone they

---

*of a crime made by a prosecuting attorney, as distinguished from an indictment presented by a grand jury.*

b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year. Also, a "yes" answer is required if a conviction has been discharged, set aside, or dismissed pursuant to an expungement or rehabilitation statute.)

c. Are you a fugitive from justice?

d. Are you an unlawful user of, or addicted to, marijuana, or a depressant, stimulant, or narcotic drug?

e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?

f. Have you been discharged from the Armed Forces under dishonorable conditions?

g. Are you an alien illegally in the United States?

h. Are you a person who, having been a citizen of the United States, has renounced his citizenship?

I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

TRANSFEREE'S (*Buyer's*) SIGNATURE
DATE



have reasonable cause to believe may not lawfully receive a firearm (18 U.S.C. 922(d)).[27]

The effect of these simple prohibitions on the flow of firearms would be severely circumscribed if the Omnibus Act is construed to disable only those persons whose status as a felon, mental defective, dishonorable discharge, fugitive from justice, etc., is not subject to collateral attack. Thus, even a validly convicted felon could relieve a dealer of criminal responsibility for selling a firearm to a felon by stating that he believed his prior conviction to be unconstitutional. And it is at least arguable that if Sections 1202(a)(1), 922(g)(1), and 922(h)(1) apply to validly convicted felons only, then a convicted felon may lie about the fact of his prior conviction without fear of violating Section 922(a)(6). Cf. *United States* v. *Pricepaul, supra*, 540 F.2d at 420. But compare *Dameron* v. *United States*, 488 F.2d 724 (5th Cir. 1974), with *United States* v. *Ransom, supra.*[28] In

---

[27] 18 U.S.C. 924(a) imposes a maximum penalty of up to five years' imprisonment or a $5,000 fine, or both, for violation of Sections 922(a)(6) and 922(d). Title XI of the Organized Crime Control Act of 1970 constitutes a virtually identical statutory scheme designed to stem the flow of explosive materials to dangerous persons. See 18 U.S.C. 842(a)(2) (false statement prohibition), 842(d) (dealer prohibition), 842(i) (dangerous persons categorized). Title XI provides a greater maximum penalty, however. See 18 U.S.C. 844(a) ($10,000 and 10 years' imprisonment).

[28] The Ninth Circuit alone has concluded that Section 922(a)(6) is not violated if a purchaser of a firearm fails to disclose the fact of his prior uncounselled conviction. See *United States* v. *Pricepaul, supra.* The court reached that

short, petitioner's construction of the Act would thwart Congress' regulatory design.

3. If an invalidly convicted felon had no means to establish his right to possess firearms other than challenging his status in the course of the firearm prosecution, then perhaps this Court might be justified in formulating such a defense despite the language, legislative history, purpose and structure of the gun control laws limned above. In fact, however, the Omnibus Act encompasses at least three avenues of prospective relief from the disability imposed by Sections 1202(a)(1), 922(g)(1) and 922(h)(1). Thus, prior to obtaining a firearm, petitioner could have—and, in our view, should have—challenged his prior conviction in a coram nobis proceeding in Florida state courts. See, *e.g.*, Fla. Const. art. 5, § 5; *Weir* v. *State*, 319 So. 2d 80 (Fla. 2d Dist. Ct. App. 1975); *L'Hommedieu* v. *State*, 362 So. 2d 72 (Fla. 2d Dist. Ct. App. 1978).[29] In addi-

result as a matter of constitutional law, however, and not a construction of the Act. 540 F.2d at 420-421. Various other courts of appeals have concluded that Section 922(a)(6) prohibits even an invalidly convicted felon from lying about the fact of conviction. See, *e.g.*, *United States* v. *Graves*, *supra*; *United States* v. *Allen*, 556 F.2d 720 (4th Cir. 1977); *United States* v. *Ransom*, *supra*; *Cassity* v. *United States*, *supra*; *United States* v. *Edwards*, 568 F.2d 68 (8th Cir. 1977).

[29] In many circumstances federal habeas corpus relief will be available under 28 U.S.C. 2254 and 2255. See *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). Had petitioner done so successfully, he would, of course, still have been subject to possible trial and conviction on the charge.



tion to judicial relief, petitioner could also have sought a pardon from the Florida executive in accordance with Section 1203(2).[30] Finally, Section 925(c) provides that any person who has been convicted of a felony (except one involving use of a firearm) may apply to the Secretary of the Treasury for relief from the firearm restrictions imposed by the Omnibus Act.[31]

The existence of these remedies, two of which are expressly contained in the Omnibus Act itself, strongly suggests that Congress did not intend to permit the invalidity defense urged on the Court by petitioner. The relief procedures contemplated by Congress re-

[30] The pardon must specifically provide that the felon may thereafter use firearms.

[31] As evidenced by its reference to "possession" of firearms, Section 925(c) applies to Section 1202(a)(1) as well as to Sections 922(g)(1) and 922(h)(1). H.R. Conf. Rep. No. 1956, *supra*, at 33. See *United States* v. *Maggard*, *supra*, 573 F.2d at 928 n.1; *United States* v. *Graves*, *supra*, 554 F.2d at 72. The Secretary may "grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). In 1978, 1,757 applications were filed and 574 were granted. Among the common reasons for denying an application are (1) the applicant is still on probation, (2) the applicant is barred from possessing firearms under state law, and (3) the applicant's prior crime involved use of a firearm. The Ninth Circuit has held that a rejected applicant may seek judicial review of an adverse decision. See *Kitchens* v. *Dept. of Treasury*, 535 F.2d 1197 (9th Cir. 1976) (arbitrary and capricious standard of review).

quire that the defendant clear his status *before* obtaining a firearm, thereby "broadly * * * keep[ing] firearms away from the persons * * * classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, *supra*, 423 U.S. at 218; see also *Scarborough* v. *United States*, *supra*, 431 U.S. at 572. Petitioner's construction of the Act, on the other hand, would encourage convicted felons who wished to obtain firearms to guess whether or not their prior conviction was invalid. As a result, the prospective remedial schemes provided by the Omnibus Act will be bypassed and the bright line prohibition heretofore established by Sections 922(g)(1), 922(h)(1), and 1202(a)(1) will be clouded.

Moreover, letting a defendant challenge the validity of his prior conviction as a defense to a Section 1202(a)(1) prosecution will interfere with the administration of the gun control laws for still other reasons. The federal courts will be burdened by time-consuming collateral issues—issues that very often would have been more easily and more accurately resolved in state court, either because the essential records are kept in state court or because the issue of validity will involve questions of state procedural and substantive law.[32] Furthermore, where, as here,

[32] If Section 1202(a)(1) is construed to apply only to validly convicted felons, then presumably a convicted felon does not violate Section 1202(a)(1) if his prior conviction is subsequently overturned on direct appeal, even though he possessed a firearm while a convicted felon. But see *United States* v. *Liles*, *supra*. Such a construction would pose serious problems of judicial administration with regard to defendants whose prior convictions are on direct appeal at the time of the gun control prosecution. It would certainly be inappropriate for the trial court to prejudge the merits of the defendant's appeal. Thus, the district judge would either have to stay the gun control prosecution (possibly violating the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*) or to proceed with a prosecution that may thereafter be rendered a nullity.



the conviction is decades old, there may be no records or only incomplete records regarding the predicate conviction. Accordingly, the government might well be unable to establish that the defendant was represented by counsel or waived the right to counsel even though in fact he was or he did. In such circumstances, the federal court may have little choice but to accept the uncontroverted allegation of the defendant and to acquit him. See *United States* v. *O'Neal*, 545 F.2d 85 (9th Cir. 1976); *United States* v. *Lufman*, 457 F.2d 165, 166-167 n.2 (7th Cir. 1972). The obvious potential for abuse and the concomitant disruption in the enforcement of the Omnibus Act are apparent.

### C. The Doctrines Of Avoidance Of Constitutional Questions And Lenity Do Not Justify Rewriting The Federal Gun Laws

1. *Avoidance of constitutional questions.* Because in petitioner's view the Sixth Amendment precludes use of an uncounselled felony conviction in a firearm prosecution (but see point IIA, *infra*), he contends (Br. 4) that Section 1202(a)(1) "should be read to avoid a construction that would render it unconstitu-

tional." See also A. 22-23 (Winter, J., dissenting).[33] To be sure, a court should construe a truly ambiguous statute to avoid a serious constitutional question. See, *e.g.*, *NLRB* v. *Catholic Bishop of Chicago*, No. 77-752 (Mar. 21, 1979), slip op. 9-11; *United States Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973); *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971). But even assuming that petitioner's constitutional claims are substantial, the maxim relied on by petitioner has no application to this case.

"[R]esort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977); see *United States* v. *Batchelder*, *supra*, slip op. 7-8; *Shapiro* v. *United States*, 335 U.S. 1, 31 (1948); *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). The language and legislative history of Section 1202(a)(1) outlined above demonstrate unequivocally that Congress intended to keep firearms away from all convicted felons, even if their convictions should subsequently be adjudged invalid for any reason. Similarly, the purpose and structure of the federal gun

[33] Of course, petitioner's construction of the statutory language would allow any felon to attack the validity of his prior conviction as a defense to a firearm prosecution, even though the defect in the particular conviction did not raise constitutional questions. See note 5, *supra*.



laws as a whole show that petitioner's reconstruction of Section 1202(a)(1) is simply not "consistent with the will of Congress." *United States Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, *supra*, 413 U.S. at 571. Accordingly, just as in *United States* v. *Batchelder*, *supra*, slip op. 7, "the maxim that statutes should be construed to avoid constitutional questions offers [petitioner] no assistance here."

2. *The principle of lenity.* This Court has often stated that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 14 (1978); *United States* v. *Bass*, *supra*, 404 U.S. at 347; *Bell* v. *United States*, 349 U.S. 81, 83 (1955). "This rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property." *Huddleston* v. *United States*, *supra*, 415 U.S. at 831. It is equally well-established, however, that the touchstone of the doctrine of lenity is the existence of a "grievous ambiguity or uncertainty in the language and structure of the [criminal statute in question]." *Ibid.*; see, *e.g.*, *United States* v. *Batchelder*, *supra*, slip op. 7; *Scarborough* v. *United States*, *supra*, 431 U.S. at 577; *Barrett* v. *United States*, *supra*, 423 U.S. at 217-218. No such ambiguity exists here.

Section 1202(a)(1) gives unambiguous notice to all convicted felons that they may not possess a firearm. Cf. *Huddleston* v. *United States*, *supra*, 415 U.S. at 831; *United States* v. *Batchelder*, *supra*, slip op. 7. Although the statute elsewhere makes exceptions for persons receiving a specific pardon (18 U.S.C. App. 1203(2)) and for persons obtaining preclearance from the Secretary of the Treasury (18 U.S.C. 925(c)), no exception appears for felons whose outstanding prior convictions are subject to collateral attack. In such circumstances, "there is no justification for indulging in uneasy statutory construction." *Barrett* v. *United States*, *supra*, 423 U.S. at 217. Moreover, the legislative history, statutory structure, and remedial purpose of the Act analyzed above manifest an unequivocal congressional intent to keep firearms from all persons who might be dangerous—including felons who may have been unconstitutionally convicted. See pages 18-35, *supra*. There is thus no occasion to apply the maxim of lenity, because "[e]ven penal laws * * * ought not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 367 (1829); see, *e.g.*, *United States* v. *Batchelder*, *supra*, slip op. 7; *Huddleston* v. *United States*, *supra*, 415 U.S. at 831; *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955); *United States* v. *Morris*, 39 U.S. (14 Pet.) 464, 475 (1840); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820).



## II. CONGRESS MAY CONSTITUTIONALLY BAR A CONVICTED FELON FROM POSSESSING A FIREARM EVEN IF THE PRIOR CONVICTION WAS OBTAINED WITHOUT THE AID OF COUNSEL

Our discussion in point I demonstrates that Congress intended to impose a firearm disability on persons with outstanding felony convictions, even if those convictions might be subject to collateral attack. We now turn to the question whether the firearm statutes thus enacted by Congress violate the Constitution. In our view, the critical question is whether Congress may impose a *civil* disability regarding possession of firearms on invalidly convicted felons. If, as we submit, that question is answered affirmatively, it then follows that Congress may attach criminal liability to those who ignore this civil bar, even if the prior conviction was obtained in violation of the Sixth Amendment.

### A. Equal Protection Concepts Do Not Preclude Congress From Imposing Firearm Disabilities Upon All Convicted Felons Regardless Of The Validity Of Their Prior Conviction

It is beyond dispute "that the concept of equal protection as embodied in the Due Process Clause of the Fifth Amendment * * * does not require that all persons be dealt with identically, but rather that there be some 'rational basis' for the statutory distinctions made * * * or that they 'have some relevance to the purpose for which the classification is made.'" *Marshall* v. *United States*, 414 U.S. 417, 422 (1974); see, *e.g.*, *New York City Transit Authority* v. *Beazer*, No. 77-1427 (Mar. 21, 1979), slip op. 23 n.39; *Vance*

v. *Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 4; *McGinnis* v. *Royster*, 410 U.S. 263, 270 (1973). Thus, the firearm regulatory scheme at issue here must be sustained as consonant with due process unless the classifications and procedures enacted by Congress bear no rational relationships to a legitimate governmental interest.[34] Section 1202(a)(1) readily meets that test.

The express congressional purpose in enacting Title VII is set forth in the statute itself:

> [T]he receipt, possession, or transportation of a firearm by felons * * * constitutes—(1) a burden on commerce or threat affecting the free flow of commerce, (2) a threat to the safety of the President of the United States and Vice President of the United States, (3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

[34] The "rational basis" test is applicable here because legislative reliance upon convict status is certainly not a suspect classification (see, *e.g.*, *DeVeau* v. *Braisted*, 363 U.S. 144, 157 (1960) (opinion of Frankfurter, J.); *McGinnis* v. *Royster*, *supra*) and the use of firearms does not trench upon any fundamental interest (see, *e.g.*, *United States* v. *Samson*, *supra*, 533 F.2d at 722; *United States* v. *Craven*, 478 F.2d 1329, 1339 (6th Cir.), cert. denied, 414 U.S. 866 (1973)). See also *Kentucky Whip & Collar Co.* v. *Illinois Cent. R.R.*, 299 U.S. 334 (1937); *Whitfield* v. *Ohio*, 297 U.S. 431 (1936); *Upshaw* v. *McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970).



18 U.S.C. App. 1201. Similarly, the legislative history of the gun control laws "evidences Congress' deep concern about the easy availability of firearms, especially to those who Congress has reason to believe pose a greater threat to community peace than does the public generally." *United States* v. *Liles*, *supra*, 432 F.2d at 20. See pages 19-22, *supra*. And in particular, Congress focused on the substantial nexus between violent crimes and the possession of firearms by "any person who has a criminal record." 114 Cong. Rec. 13220 (1968) (remarks of Sen. Tydings); see, *e.g.*, *id.* at 16298 (remarks of Rep. Pollock) ("criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner").[35]

In light of the overwhelming evidence that felons as a group are more likely to use firearms unlawfully than the public as a whole, Congress rationally concluded that any felony conviction—even an allegedly invalid one—is a sufficient basis on which to prohibit the possession of firearms. See, *e.g.*, *United States* v. *Samson*, *supra*, 533 F.2d at 722; *United States* v. *Ransom*, 515 F.2d 885, 891-892 (5th Cir. 1975); *United States* v. *Andrino*, 497 F.2d 1103, 1108 (9th Cir.), cert. denied, 419 U.S. 1048 (1974); *United States* v. *Burton*, 475 F.2d 469, 471 (8th Cir.), cert. denied, 414 U.S. 835 (1973); *United*

[35] Senator Long, the sponsor of Title VII, noted that, for example, the assassins of Dr. Martin Luther King and civil rights worker Viola Liuzzo had prior criminal records. See 114 Cong. Rec. 14773 (1968).

*States* v. *Craven*, 478 F.2d 1329, 1339 (6th Cir.), cert. denied, 414 U.S. 866 (1973); *United States* v. *Thoresen*, 428 F.2d 654, 658-662 (9th Cir. 1970). Thus, even assuming that the fact of an uncounselled or otherwise invalid conviction is an unreliable indicator of a particular person's propensity to misuse firearms, Section 1202(a)(1) is not unconstitutional as applied to invalidly convicted felons. Overinclusive and imperfect legislative classifications do not violate the Due Process Clause, so long as the general classification bears some reasonable relationship to the legislative goal. See, *e.g.*, *New York City Transit Authority* v. *Beazer*, *supra*; *McGinnis* v. *Royster*, *supra*. And this Court has repeatedly recognized that a legislature may constitutionally prohibit convicted felons from engaging in activities far more fundamental than the right to possess firearms at issue here. See *Richardson* v. *Ramirez*, 418 U.S. 24 (1974) (disenfranchisement of felons); *DeVeau* v. *Braisted*, 363 U.S. 144, 157-160 (1960) (felons barred from waterfront employment); *Hawker* v. *New York*, 170 U.S. 189 (1898) (prohibition on medical practice by a felon).

Even if one ignored the fact that Congress was broadly distinguishing between the general population and convicted felons and considered only the subclass of unconstitutionality convicted persons, the imposition of a civil firearms disability on the latter group remains justifiable. Congress could rationally have concluded that persons who have been invalidly convicted nonetheless pose a sufficient threat



to public safety to justify the slight civil disability involved in this case. See, *e.g.*, *United States* v. *Graves*, *supra*, 554 F.2d at 69; *United States* v. *Samson*, *supra*, 533 F.2d at 723 ("the consequences of the deprivation are relatively slight compared with the gravity of the public interest sought to be protected"). Uncounselled convictions are, for example, reliable enough to serve as the basis for imposing a criminal fine—a more significant sanction than the minor civil incapacity created by Section 1202(a)(1). See *Scott* v. *Illinois*, No. 77-1177 (Mar. 5, 1979). Moreover, the fact of an uncounselled conviction, which represents the grand jury's or magistrate's finding of probable cause and the trier of fact's finding of guilt beyond a reasonable doubt, is at least as reliable an indicator of antisocial tendencies as the fact of indictment, commitment, dishonorable discharge, or deportability.[36] And just as

---

[36] Due process and the Sixth Amendment require that the defendant be accorded various rights at trial and that his guilt be established beyond a reasonable doubt. In contrast, indictment requires only an ex parte finding of probable cause by the grand jury; the defendant has no right to appear before the grand jury, and, if he does testify, he has no right to counsel. *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976) (plurality opinion). Similarly, the Court has recently concluded that a civil commitment requires a lesser standard of proof than that necessary to convict. See *Addington* v. *Texas*, No. 77-5992 (Apr. 30, 1979). See also H.R. Conf. Rep. No. 1956, *supra*, at 30 (definition of commitment includes those committed by a commission or administrative tribunal). Furthermore, there is no right to jury trial or counsel in a dishonorable discharge proceeding (see 10 U.S.C. 1169; 32 C.F.R. Part 70) or in an immigration proceeding (8 U.S.C.

Congress may constitutionally impose substantial limitations on the activities of indictees, including arrest, incarceration and the restrictions attendant thereto, and various civil disabilities,[37] a fortiori it may constitutionally prohibit invalidly convicted felons—who, even if their convictions were considered void, would still stand indicted—from obtaining or possessing firearms.

Finally, we note that any doubts about the reasonableness of the felony classification contained in Section 1202(a)(1) must be resolved favorably in light of the existence of various remedies to remove the disability. The conviction may be set aside on collateral attack, the individual can be pardoned, and Section 925(c) permits the Secretary of the Treasury to make an individualized determination regarding the prospective use of firearms by a convicted felon. These civil remedies provide ample means of eliminating possible unfairness in particular cases. Cf. *Carter* v. *Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972). In other words, if petitioner's uncounselled conviction had no bearing on his fitness to possess firearms—an unrealistic assumption given petitioner's substantial rec-

1252(b)(2); *Murgia-Melendrez* v. *INS*, 407 F.2d 207, 208-209 (9th Cir. 1969)).

[37] See, *e.g.*, *Bell* v. *Wolfish*, *supra*; *Gerstein* v. *Pugh*, 420 U.S. 103, 111-114 (1975); *United States* v. *Craven*, *supra*; *United States* v. *Thoresen*, *supra*. See also 18 U.S.C. 3146 (release prior to trial); 18 U.S.C. 1073 (flight to avoid prosecution unlawful even if defendant is not guilty of underlying crime).



ord of violence and firearm misuse—[38] he could have and should have established his right to obtain a gun despite his felony conviction in accordance with the statutory scheme.

### B. The Sixth Amendment Does Not Bar Recognition Of The Fact Of A Prior Uncounselled Conviction As A Basis For Imposing A Firearm Disability

Although petitioner does not contest that Congress may constitutionally prohibit invalidly convicted felons in general from possessing firearms, he nonetheless contends that the Sixth Amendment bars the use of uncounselled convictions in this context.[39] To be sure, the Court has made clear that an outstanding uncounselled felony conviction cannot reliably be used for certain purposes. See *Burgett* v. *Texas*, 389 U.S. 109 (1967); *United States* v. *Tucker*, 404 U.S. 443 (1972); *Loper* v. *Beto*, 405 U.S. 473 (1972). But the Court has never suggested that an uncounselled conviction is invalid for all purposes (see, *e.g.*, *Scott* v. *Illinois*, *supra*), and if we are correct in our general

[38] Petitioner has been repeatedly convicted for assaults and misuse of firearms, such as discharging a firearm in a public place. All of these convictions were classified as misdemeanors. Furthermore, in this case, petitioner was arrested as he approached an illegal gambling casino for unlawfully concealing a firearm. See page 4, *supra*.

[39] We assume for the purposes of this discussion that petitioner was convicted in 1961 without the aid of counsel. Such a felony conviction is, of course, invalid. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963); *Kitchens* v. *Smith*, 401 U.S. 847 (1971) (holding *Gideon* wholly retroactive).

submission that the invalidity of a conviction does not *ipso facto* nullify the firearms possession disability of Section 1202(a)(1), that conclusion is as valid where the defect in the conviction is lack of counsel as it is with any other defect.

1. In *Burgett* v. *Texas*, the defendant was indicted for assault with intent to kill and also as a repeat felony offender under a state recidivist statute. 389 U.S. at 111. The indictment, including its reference to the defendant's four prior felony convictions, was read to the jury at the beginning of the defendant's trial. In addition, the prosecution produced evidence regarding two of the convictions during the course of trial. *Id.* at 111-112. However, because at least two of the convictions were invalid,[40] the trial court dismissed the recidivist charges and instructed the jurors to disregard the evidence concerning the invalid convictions. *Id.* at 113 & n.6. The jury thereafter convicted the defendant on the assault charge, and the state courts affirmed.

This Court reversed, stating that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the principle of that case." 389 U.S. at 115. The Court found that the introduction of the tainted convictions had prejudiced the defendant de-

[40] One of the convictions was obtained without the aid of counsel and the other was void under state law. The recidivist charge could not be sustained on the basis of the remaining two felonies.



spite the trial court's curative instruction. *Ibid. Burgett* thus established that uncounselled convictions could neither serve as the predicate for a recidivist sentence nor be used as evidence of a defendant's bad character or propensity to commit the charged offense.

*Burgett* was followed in *United States* v. *Tucker*, *supra*, in which the Court held that a convicted defendant's sentence could not be enhanced on the basis of prior uncounselled convictions. 404 U.S. at 448-449.[41] The Court therefore remanded the case for a determination "whether the sentence * * * might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained." *Id.* at 448.[42]

*Loper* v. *Beto*, *supra*, involved use of uncounselled convictions to impeach the credibility of a defendant who had testified at trial. Mr. Justice Stewart's plurality opinion in *Loper* concluded that such impeachment was barred by the decision in *Burgett* because the prosecution had used the uncounselled convic-

[41] Mr. Justice Blackmun, joined by the Chief Justice, dissented on the grounds that Tucker would have received the same sentence even if the sentencing judge had been unaware of the prior convictions. Mr. Justice Powell and Mr. Justice Rehnquist did not participate.

[42] The Court did not forbid the sentencing judge from considering the facts underlying the invalid conviction, and the courts of appeals have concluded that the district court may do so. See, *e.g.*, *United States* v. *Bowdach*, 561 F.2d 1160, 1175-1176 (5th Cir. 1977); *Drayton* v. *New York*, 556 F.2d 644, 646-647 (2d Cir.), cert. denied, 434 U.S. 958 (1977); *United States* v. *Haygood*, 502 F.2d 166, 171-172 n.16 (7th Cir. 1974).

tions "to support guilt." 405 U.S. at 482 (quoting from *Burgett, supra*, 389 U.S. at 115).[43] Mr. Justice Stewart indicated, however, that an uncounselled conviction could be "used for the purpose of directly rebutting a specific false statement made from the witness stand." 405 U.S. at 482 n.11. Thus, the Court recognized that an uncounselled conviction is not void for all purposes and that, for example, a felon could not lie about the fact of his prior conviction even if that conviction were subsequently shown to have been obtained in violation of the Sixth Amendment.

2. Use of an uncounselled felony conviction as the basis for imposing a civil firearms disability, enforcible by criminal sanctions, is not inconsistent with the *Burgett* line of cases. In each of those cases this Court found that the conviction or sentence in question violated the Sixth Amendment because it depended upon the reliability of a particular uncounselled conviction in the past. The federal gun laws, however, focus on the mere fact of conviction, regardless of its reliability, in order to keep firearms away from potentially dangerous people. Criminal liability arises only when a convicted person deliberately ignores the fact of his prior conviction, either by lying about its existence (18 U.S.C. 922(a)(6)) or by receiving, transporting, or possessing a

[43] Mr. Justice White concurred, stating that he would remand for consideration of harmless error. 405 U.S. at 485. The Chief Justice, Mr. Justice Powell, Mr. Justice Blackmun, and Mr. Justice Rehnquist dissented in three different opinions.



firearm (18 U.S.C. 922(g)(1), 922(h)(1), and App. 1202(a)(1)) prior to obtaining judicial, executive, or administrative relief in accordance with the Omnibus Act. The plurality decision in *Loper* seemingly makes clear that such a limited use of the historical fact of an uncounselled conviction does not deprive a defendant of his Sixth Amendment rights. 405 U.S. at 482 n.11.

For example, it could not seriously be contended that the Sixth Amendment would afford a defense to an escape charge if the prisoner's outstanding conviction were invalid under *Gideon*. See, *e.g.*, *United States* v. *Cluck*, 542 F.2d 728, 732 (8th Cir.), cert. denied, 429 U.S. 986 (1976); *United States* v. *Smith*, 534 F.2d 74 (5th Cir. 1976), cert denied, 429 U.S. 1100 (1977); *United States* v. *Allen*, 432 F.2d 939 (10th Cir. 1970); *United States* v. *Haley*, 417 F.2d 625 (4th Cir. 1969); *Lucas* v. *United States*, 325 F.2d 867, 867-868 n.2 (9th Cir. 1963). Yet the logic of petitioner's contention would permit such a defense, since the historical fact of conviction would be used to "support guilt" in that case in just the same fashion that it was used here. It is apparent, however, that Congress may constitutionally rely on the fact of an uncounselled conviction for at least some purposes, particularly where, as here, the immediate collateral consequence of the conviction is simply the imposition of a *civil* disability. See *Mays* v. *Harris*, 523 F.2d 1258, 1260 (4th Cir. 1975).

*Burgett* and its progeny are distinguishable for still another reason. In those cases, the government first attempted to use the prior uncounselled convic-

tion at the time of the subsequent trial. The Court therefore allowed the defendant to challenge the validity of his prior conviction at that time—there being no prior occasion when it would have been relevant for him to have done so. On the other hand, Sections 1202(a), 922(g)(1), and 922(h)(1) impose an immediate firearm disability upon the occurrence of the felony conviction. It is therefore appropriate to require the convicted person who wishes to possess a firearm to resort to the remedies provided by law to challenge the validity of his prior conviction (either in court or pursuant to 18 U.S.C. 925(c) or 18 U.S.C. App. 1203(2)) *before* obtaining a firearm—that is, at the time the adverse consequence attaches. See Note, *Prior Convictions And The Gun Control Act of 1968*, 76 Colum. L. Rev. 326, 338-339 (1976). Accordingly, the Sixth Amendment does not bar imposition of a criminal penalty upon a convicted felon who fails to adhere to the regulatory procedures established by the Omnibus Act, even if his prior conviction proves to be invalid under *Gideon*. See Note, *supra*, 76 Colum. L. Rev. at 339; cf. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967).[44]

[44] In *Walker*, the Court concluded that civil rights demonstrators who violated a previously issued, but unlawful injunctive order based on an unconstitutional statute were nonetheless properly held in contempt. The Court observed that the demonstrators were not simply free to judge their own case and to disregard the order, but rather should have "appl[ied] to the * * * courts to have the injunction modified or dissolved." 388 U.S. at 317, 320-321. So too here, petitioner was not free to judge his own case, but should have applied to the courts to have his conviction set aside or pursued his remedies under the Omnibus Act.



A comparison of the circumstances of an unconstitutionally convicted felon with those of an indictee who is subsequently acquitted illustrates the compelling logic of our position. As we have already indicated, an indictment represents only the grand jury's ex parte determination that there is probable cause to believe that the accused has committed a crime. See note 36, *supra*. Thus, a person may constitutionally be indicted without the aid of counsel, and if an indictee receives a firearm while under indictment he may constitutionally be prosecuted for violating Section 922(h)(1), even if he is thereafter found not guilty. See page 26, *supra*.[45] Petitioner nonetheless insists that the unconstitutionally convicted felon may not be prosecuted under Section 922(h)(1) even though he has been both indicted and found guilty beyond a reasonable doubt by the trier of fact. We submit that the Sixth Amendment does not mandate such an irrational result.[46]

[45] Similarly instructive comparisons can be made between an unconstitutionally convicted felon and an illegal alien or a dishonorable dischargee, neither of whom is entitled to appointed counsel. See note 36, *supra*.

[46] Although petitioner does not make the argument, it might be contended that the imposition of a firearm disability flowing from the fact of conviction is a punishment in violation of the Sixth Amendment where the conviction is invalid under *Gideon*. The disability imposed is civil in nature, however, and many civil or even quasi-criminal disabilities may be imposed without the right to counsel. See, *e.g.*, *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976); cf. *Bell* v. *Wolfish*, *supra*. In any event, just last Term the Court concluded that an uncounselled conviction may serve as the basis

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

ANDREW J. LEVANDER
*Assistant to the Solicitor General*

JEROME M. FEIT
JOEL M. GERSHOWITZ
*Attorneys*

NOVEMBER 1979

---

for imposition of a criminal fine. *Scott* v. *Illinois*, *supra*. Thus, even if the firearm disability could fairly be described as punishment, the temporary and limited nature of that punishment for a person whose conviction is actually invalid under *Gideon* is less onerous than the fine upheld in *Scott*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 304019 107

FOR ARGUMENT



In The

# Supreme Court of the United States

October Term, 1979

NO. 78-1595

GEORGE CALVIN LEWIS, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## REPLY BRIEF FOR THE PETITIONER

ANDREW W. WOOD
J. HATCHER JOHNSON
SCOTT H. SWAN
White & Wood, P.C.
300 West Main Street
Richmond, Virginia 23220
*Counsel for Petitioner*

*Of Counsel*
NEAL P. RUTLEDGE
Suite 602
1211 Connecticut
Avenue, N.W.
Washington, D.C. 20036

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### Cases



### Other Authorities

In The

# Supreme Court of the United States

October Term, 1979

---

NO. 78-1595

---

GEORGE CALVIN LEWIS, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

## REPLY BRIEF FOR THE PETITIONER

---

The petitioner, George Calvin Lewis, Jr. respectfully submits this brief in reply to the brief filed on behalf of the United States.

### ARGUMENT

At the outset, we would respectfully submit that the government has not correctly phrased the question presented. In its brief, the United States submits, on page 2, that the question is "Whether a defendant who is a previously convicted felon may challenge the constitutionality of his prior

conviction as a defense to a prosecution for unlawfully possessing a firearm." We believe that the question is narrower. The underlying conviction in this case was obtained in violation of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). In his dissenting opinion in the Court of Appeals, Judge Winter based his conclusions on the fact that the defect alleged was the denial of Lewis' Sixth Amendment right to counsel. (App. 27). Similarly, in a Comment on the *Lewis* case in the Summer 1979 issue of *The Harvard Law Review,* the writer correctly seems to suggest that the real issue involves the *Gideon* violation, and not every alleged constitutional infirmity might be set up as a defense. *The Use of Prior Uncounseled Convictions In Federal Gun Control Prosecutions: United States* v. *Lewis,* 92 *Harv. L. Rev.* 1790, 1798 (June, 1979).

The United States suggests on page 17 that the omission from the federal gun laws of provisions permitting the accused to challenge the constitutionality of the predicate felony suggests that Congress intended no such defense to be available. However, we submit that the two statutes mentioned, 21 U.S.C. § 851 (c) (2) and 18 U.S.C. § 3575 (e), reflect a general congressional awareness that such defenses are proper defenses.

The government, on page 32 of its brief, states that the burden was on Lewis to establish his right to possess a firearm by previously challenging his prior conviction before he was arrested on the firearms charge. We believe, however, that any interpretation which places on Lewis the duty of expunging a patently void conviction is unreasonable and at odds with this Court's decision in *Gideon, supra, Burgett* v. *Texas,* 389 U.S. 109 (1967), *Loper* v. *Beto,* 405 U.S. 473 (1972), and *United States* v. *Tucker,* 404 U.S. 443 (1972).

Further, the statutes involved can be interpreted in such



a fashion as to avoid reaching the constitutional question. There is, in our view, necessarily an ambiguity in the word "felon" or "felony" when used to describe the status of one convicted in violation of *Gideon* v. *Wainwright, supra.* "Though Lewis' constitutional objections may not be unequivocally established in Supreme Court precedent, they do raise questions serious enough to merit a narrower construction of the statute." *The Use of Prior Uncounseled Convictions in Federal Gun Control Prosecutions: United States* v. *Lewis, supra* at 1795. We can perceive no reason to attribute to Congress the intention to include persons whose convictions are absolutely void.

The government suggests, beginning on page 39 of its brief, that equal protection concepts do not preclude a conviction in this case. While it is true that the petitioner did not raise equal protection or due process points in his main brief, that is not to say that these concepts do not apply. See Footnote 52, *The Use of Prior Uncounseled Convictions In Federal Gun Control Prosecutions: United States* v. *Lewis, supra* at 1797.

Finally, the United States, on page 48 of its brief, appears to argue that the real penalty imposed on Lewis was a civil firearms disability. Obviously, that is not the case. While a civil liability did attach in the view of the Court of Appeals, the real penalty was imprisonment for eighteen months. The government also suggests, on page 49 of its brief, that "it could not seriously be contended that the Sixth Amendment would afford a defense to an escape charge if the prisoner's outstanding conviction were invalid under *Gideon.*" We believe that this statement is inaccurate. The crime of escape, we submit, presumes valid custody. See generally 30A *C.J.S., Escape,* Section 2, page 876. Also, in *McDorman* v. *Smyth,* 188 Va. 474 (1948), the Supreme Court

of Virginia suggested that if the accused had escaped from custody pursuant to a conviction void from want of counsel, then his escape would not have been punishable.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

/s/ ANDREW W. WOOD
*Counsel for* GEORGE CALVIN LEWIS, JR.

ANDREW W. WOOD
J. HATCHER JOHNSON
SCOTT H. SWAN
White & Wood, P. C.
300 West Main Street
Richmond, Virginia 23220

NEAL P. RUTLEDGE
Suite 602
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

## CERTIFICATE

I certify that three copies of this Brief were mailed first class, postage prepaid, to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

ANDREW W. WOOD